2-16-2010

Jacklin Land Co. v. Blue Dog RV, Inc. Clerk's Record v. 4 Dckt. 37076

Vol. 4 of 5

LAW CLERK

IN THE SUPREME COURT
OF THE STATE OF IDAHO

JACKLIN LAND COMPANY, an Idaho Limited Partnership,

Plaintiffs/Respondent,

vs.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants/Appellants.

TRANSCRIPT ON APPEAL
In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai

ATTORNEY FOR APPELLANTS
MICHAEL J. HINES

ATTORNEY FOR RESPONDENTS
JOHN F. MAGNUSON

SUPREME COURT DOCKET #37076-2009

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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

v.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

NO. CV-08-6752

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION

Pursuant to I.R.C.P. 11(a)(2)(B), Defendants hereby respectfully request the Court to reconsider its decision and order to reserve for trial the issue of irreparable injury and/or damages. As determined by the Court, Jacklin has not shown any evidence of irreparable injury, and as set forth herein, it will not be able to do so at trial. Furthermore, Jacklin is not entitled to recover damages at trial because it did not request damages in its Complaint, or otherwise put Defendants on notice that it was seeking damages. The Court should grant summary judgment that an injunction cannot issue and that Jacklin cannot recover damages.

I. INTRODUCTION

As recognized by the Court in its June 15, 2009, Memorandum Decision and Order on Cross-Motions for Summary Judgment ("Decision and Order"), Jacklin did not present any evidence of waste or great injury at the summary judgment stage that would entitle it to injunctive relief. The Court reserved for trial the issue of irreparable injury and damages to determine whether an injunction should issue. However, for multiple reasons, Jacklin will not be able to prove waste or great or irreparable injury, or recover any damages at trial.

First, Jacklin is bound by its I.R.C.P. 30(b)(6) designee's testimony that Jacklin suffered no injury or damages. Second, Jacklin has not identified an expert witness in accordance with the Court's Scheduling Order, or in response to Defendants' specific discovery request, that could testify at trial regarding injury or damages. Third, Jacklin has not seasonably supplemented its discovery responses to identify witnesses that could address injury or damages, so it should not be able to present testimony at trial regarding injury or damages. Fourth, Jacklin did not request damages in its Complaint, and will not be able to establish them at trial, so it is not entitled to recover damages.

Defendants respectfully request the Court to reconsider Defendants' Cross-Motion for Summary Judgment with respect to Jacklin's failure to establish any irreparable injury or damages, and grant Defendants summary judgment as follows: 1) an injunction cannot issue because Jacklin has suffered no irreparable injury; and 2) Jacklin is not entitled to damages because it failed to request them in its Complaint or otherwise notify Defendants that it was seeking damages.

II. FACTS

For purposes of Defendants' Motion for Reconsideration, Defendants incorporate by reference the undisputed facts as set forth in the Court's Decision and Order, and as set forth in Defendants' *Response to Plaintiff's (1) Second Motion for Summary Judgment, and (2) Motion for Reconsideration* that was filed contemporaneously with this motion.

III. ARGUMENT

A. STANDARD OF REVIEW ON RECONSIDERATION

Idaho Rule of Civil Procedure 11(a)(2)(B) provides that "a motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of a final judgment but not later than fourteen (14) days after the entry of the final judgment." The Idaho Supreme Court has held that "pursuant to Rule 11(a)(2), a party making a motion for reconsideration is permitted to present new evidence." PHH Mortg. Services Corp. v. Perreira, 146 Idaho 631, 636, 200 P.3d 1180, 1185 (2009). Specifically, the Court has provided as follows with respect to motions for reconsideration:

> A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact.

> Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

Coeur d'Alene Mining Co. v. First Nat. Bank of North Idaho, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). The decision to grant or deny a request for reconsideration "rests in the sound discretion of the trial court." Carnell v. Barker Management, Inc., 137 Idaho 322, 329, 48 P.3d 651, 658 (2002).

B. JACKLIN CANNOT, AND WILL NOT BE ABLE AT TRIAL TO ESTABLISH IT SUFFERED ANY IRREPARABLE INJURY.

In order to recover the injunctive relief it seeks, Jacklin must prove that it has suffered an irreparable injury. The Court already determined that Jacklin did not show any evidence of irreparable injury at the summary judgment stage, and Jacklin's current motions do not allege any injury. Notably, Jacklin will not be able to show any evidence of irreparable injury should this issue be tried because Jacklin will be bound at trial to its Rule 30(b)(6) designee's testimony that Jacklin suffered no injury or damages. Furthermore, Jacklin will not be able to present any additional evidence of irreparable injury. Jacklin failed to identify an expert to testify regarding irreparable injury pursuant to the Court's case schedule order, or in response to Defendants' discovery requests. Jacklin also did not supplement its discovery to identify

law witnesses or individuals with knowledge of injury or damages in response to Defendants' specific discovery request.[1]

1. Jacklin Must Prove that it Suffered Irreparable Injury.

This Court has already recognized that Idaho law requires Jacklin to prove that it will suffer waste or great or irreparable injury in order for an injunction to issue. See *Decision and Order*, p. 25. The Court stated: The party seeking an injunction bears the burden of proving the right thereto. Id. (citing Harris v. Cassia County, 106 Idaho 513, 517, 681 P.2d 988 (1984)).

In Jacklin's present motions, it argues that it does not have to prove irreparable injury in a breach of restrictive covenant context. However, as set forth in Defendants' *Response to Plaintiff's (1) Second Motion for Summary Judgment, and (2) Motion for Reconsideration*, Jacklin's argument fails because Jacklin did not provide the Court with any binding authority that requires the Court to change its Decision and Order. Idaho law requires Jacklin to show irreparable injury in order for an injunction to issue. Furthermore, Jacklin's proposition that the general rule requires a finding of per se irreparable injury if a restrictive covenant is breached is erroneous. Defendants incorporate herein their *Response to Plaintiff's (1) Second Motion for Summary Judgment, and (2) Motion for Reconsideration*, and the authorities cited therein.

2. Jacklin Didn't Prove Irreparable Injury at the Summary Judgment Stage.

The Court recognized in its Decision and Order that "Jacklin has not provided the Court (at least not at summary judgment) with evidence of waste or great injury." See *Decision and*

[1] Even had Jacklin identified a lay witness to opine on damages, such would lack the necessary foundation and would not be admissible. Property valuation and economic loss is the province of expert testimony, not lay testimony.

Order, p. 25. Notably, Jacklin's present motions do not allege additional facts or point to any new evidence of irreparable injury. Jacklin is relying solely on its argument that it doesn't have to prove irreparable injury where a restrictive covenant is violated. Jacklin's argument fails for the reasons set forth in Defendants' *Response to Plaintiff's (1) Second Motion for Summary Judgment, and (2) Motion for Reconsideration.*

3. Jacklin is Bound by its I.R.C.P. 30(b)(6) Designee's Testimony that Jacklin Did Not Suffer Any Damages or Irreparable Injury.

Jacklin identified Bob Stoeser as its Rule 30(b)(6) corporate designee, and the Defendants deposed him in that capacity. Mr. Stoeser's Rule 30(b)(6) testimony is binding on Jacklin. Reilly v. Natwest Markets Group Inc., 181 F.3d 253, 268 (2nd Cir.1999); Nevada Power Co. v. Monsanto Co., 891 F.Supp. 1406, 1418 (Nev.1995) (a corporation must prepare a 30(b)(6) designee to give knowledgeable and binding answers). Jacklin is barred from offering evidence contrary to the Rule 30(b)(6) testimony. Rainey v. American Forest and Paper Association, Inc., 26 F. Supp.2d 82, 94-95 (D.C. 1998) (purpose of rule is to "prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case").[2]

On direct examination in his deposition, Mr. Stoeser unequivocally stated that Jacklin has not been harmed or injured by Blue Dog's RV operation on KLP's property:

[2] I.R.C.P. 30(b)(6) is similar in all material respects to Fed. R.Civ. P. 30(b)(6), so the Court may look to rulings on the federal rule for guidance in interpreting the Idaho rule. Compton v. Compton, 101 Idaho 328, 334 612 P.2d 1175 (1980).

Q. (By Mr. Hines). Are you able to quantify for me any monetary damage or injury as a result of Blue Dog's RV operation?
A. (Jacklin's 30(b)(6) Representative). No.
Q. Are you aware of any facts to indicate that Jacklin has been irreparably harmed as a result of Blue Dog's operation?
A. As stated before, the current tenant. There's been inquiries as to what's going on because everybody else has had to comply with the CC&Rs, and they're wondering what's going on with Blue Dog.
Q. But how has that caused any irreparable harm to Jacklin?
A. It hasn't yet.
Q. So sitting here today you're not aware of any facts to suggest that Blue Dog's operation has caused any irreparable harm, correct?
A. Not as of yet.
Q. Correct?
A. Correct.

Affidavit of Michael J. Hines in Support of Defendants' Motion for Reconsideration, Exhibit A, p. 89.

After Mr. Hines's initial direct examination, Jacklin's attorney asked Mr. Stoeser several questions regarding damages. *Hines Aff.*, Ex. A, pp. 115-118. Those questions and Mr. Stoeser's responses are set forth in the Court's Decision and Order at page 25, but Mr. Stoeser did not contradict his earlier testimony that there were no damages, and the Court found Mr. Stoeser's response to Jacklin's attorney's questions to be speculative regarding damages. See *Decision and Order*, p. 26. On re-direct, Mr. Stoeser confirmed that Jacklin did not suffer any injury or damages:

Q. (By Mr. Hines). With respect to alleged damages caused by the RV Center operation, that operation has been going from July 2008 until today, correct?
A. (Jacklin's 30(b)(6) Representative). Correct.
Q. Can you identify a single perspective [sic] tenant who Jacklin has lost as a result of the operation?
A. No.
Q. Can you identify a single land sale that was foregone because of the operation?
A. No.

Hines Aff., Ex. A, p. 121.

Notably, Jacklin's present motions do not identify new facts or evidence regarding injury or damages. As discussed more fully below, Jacklin did not identify an Expert witness in this matter, and did not disclose any other persons in its discovery responses that has knowledge of any alleged injury suffered by Jacklin. As a result, Jacklin's evidence of injury will be based solely on the testimony of its Rule 30(b)(6) designee, which clearly sets forth that Jacklin did not suffer any injury or damages.

4. Jacklin Failed to Identify an Expert Witness.

The Court's Scheduling Order, Notice of Trial Setting and Initial Pretrial Order ("Scheduling Order") required Jacklin to designate expert witnesses no later than 180 days before trial. Jacklin did not disclose an expert witness pursuant to the Court's Scheduling Order. *Hines Aff.*, ¶ 4. As a result, one of the various sanctions listed in I.R.C.P. 16(i), and set forth in the Scheduling Order, will apply, including, but not limited to, an order that Jacklin will not be allowed to call an expert at trial. I.R.C.P. 16(i); See also McKim v. Horner, 143 Idaho 568, 149 P.3d 843 (2006) (court properly refused to allow testimony from witness disclosed by plaintiff after the deadline imposed by the case schedule order).

Furthermore, Jacklin failed to identify any experts in response to Defendants' discovery, which specifically requested the identity of each person Jacklin expected to call as an expert witness at trial, and the subject matter on which the identified expert would testify.

In Defendants' first set of discovery, Interrogatory No. 4 specifically requested Jacklin to identify and set forth the name of each person it expected to call as an expert witness at trial, and to identify the subject matter to which said expert would testify. *Hines Aff.*, Ex. B, p. 4.

Jacklin answered that it "has yet to make a determination as to those individuals qualified as "expert witnesses" whom it intends to call to testify ...," and that the identities of such individuals would be disclosed in conformance with the Court's case schedule order. Id. Jacklin never supplemented this discovery response, and as noted above, did not disclose any experts in conformance with the Court's case schedule order. *Hines Aff.*, ¶ 4.

Jacklin's failure to identify in discovery an expert witness and the subject matter to which he or she would testify prevents Jacklin from calling an expert at trial. I.R.C.P. 26(e)(1), (4); Clark v. Klein, 137 Idaho 154, 45 P.3d 810 (2002) (court held that expert witness should not have been permitted to testify where his identity and the subject matter to which he would testify had not been disclosed pursuant to proper discovery request).

As a result, even if Jacklin could establish irreparable injury that would not contradict the testimony of its Rule 30(b)(6) designee's testimony, it's prevented from presenting an expert to testify because it didn't disclose one in response to Defendants' specific discovery request, or pursuant to the Court's case schedule order.

5. Jacklin Didn't Identify Witnesses or Individuals with Knowledge Regarding Injury in Response to Defendants' Specific Discovery Request.

I.R.C.P. 26(e)(1) requires a party "to seasonably supplement" its discovery responses as to the identity and location of persons having knowledge of discoverable matters. A party that fails to timely supplement its responses may be excluded from presenting testimony of that witness at trial. I.R.C.P. 26(e)(4).

Interrogatory No. 2 of Defendants' first set of discovery requested Jacklin to state the names of each person who has knowledge of the facts and circumstances of this matter, and the substance of the knowledge each person is believed to possess. *Hines Aff.*, Ex. B, p. 2-3.

Jacklin identified four individuals from Jacklin and set forth in some detail the knowledge that each possessed about this matter. Significantly, Jacklin **did not** identify any of the listed individuals as having knowledge of injury or damage to Jacklin. Id.

Interrogatory No. 3 of Defendants' first set of discovery requested Jacklin to state the names of the individuals it expected to call as witnesses in this matter. *Hines Aff.*, Ex. B, p. 4. Jacklin responded that it "has yet to make a determination as to those individuals it intends to call as witnesses at trial." Id.

To date, Jacklin has not supplemented its discovery responses to identify any other persons with knowledge, and has not supplemented its responses to identify the individuals it expects to call as witnesses at trial. *Hines Aff.*, ¶ 5.

Since damages and/or irreparable injury is the only issue left to be tried, any witnesses Jacklin discloses would pertain to this issue. In reliance on Jacklin's discovery responses, Defendants' took the deposition of Jacklin's Rule 30(b)(6) designee in an effort to discover what, if any, injury or damages Jacklin allegedly suffered. Jacklin has not seasonably disclosed any other persons with knowledge regarding injury or damages, or disclosed who it expects to call as a witnesses at trial. As a result, Defendants are presently unaware of any other individuals with information who they could depose regarding Jacklin's alleged injury or damages. Based on the scheduled trial date, if Jacklin were to now identify witnesses, Defendants would be prejudiced.

C. JACKLIN DID NOT REQUEST DAMAGES IN ITS COMPLAINT AND IS THEREFORE NOT ENTITLED TO RECOVER DAMAGES

Even if Jacklin could establish damages, it is not entitled to recover them because it did not request them in its Complaint and has not otherwise given any indication that it seeks

damages in this case. The only relief Jacklin requested in its Complaint was declaratory and injunctive relief.

I.R.C.P. 8(a)(1) requires a party to set forth in its pleading a demand for judgment for the relief to which it deems itself entitled.

As set forth above, because Jacklin cannot, and will not be able at trial to establish any waste or great or irreparable injury as a result of any violation of the applicable use agreement, it cannot receive injunctive relief. In its Decision and Order, the Court cited testimony from Jacklin's Rule 30(b)(6) designee and implied that Jacklin may be able to establish some damages in the form of tenants leaving or potential tenants deciding not to lease property. See *Decision and Order*, pp. 25-26. However, based on Jacklin's failure to request damages in its prayer for relief, or to even allege irreparable injury, and its inability to provide any evidence regarding damages, Jacklin is not entitled to recover damages.

It should be noted that even if Jacklin could prove damages, and had requested them in its Complaint, such damages would be capable of calculation and therefore an injunction could not issue. Bach v. Mason, 190 F.R.D. 567 (D.Idaho 1999) (requirements for issuance of a permanent injunction is the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law).

IV. CONCLUSION

For the reasons cited above, Defendants respectfully request the Court to reconsider its Decision and Order regarding Defendants' Cross-Motion for Summary Judgment on the issue

of injury and damages. Defendants request this Court to enter an order that 1) an injunction cannot issue because Jacklin has suffered no irreparable injury; and 2) Jacklin is not entitled to damages because it failed to request them in its Complaint or otherwise notify Defendants that it was seeking damages.

DATED this 27th day of July, 2009.

LUKINS & ANNIS, P.S.

By _____
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ISB #6876
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of July, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

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Attorney for Plaintiff

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- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX) to (208) 667-0500

Linda Warnock
LINDA WARNOCK

MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR RECONSIDERATION: 13

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

vs.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

CASE NO. CV-08-6752

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S (1) SECOND MOTION FOR SUMMARY JUDGMENT; AND (2) MOTION FOR RECONSIDERATION

COMES NOW Plaintiff Jacklin Land Company (hereafter "Jacklin"), by and through its attorney of record, John F. Magnuson, and respectfully submits this Reply Memorandum in support of its (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration. This Memorandum is supported by the pleadings and submissions on file herein, including the submissions previously filed by Jacklin in conjunction with the March 3, 2009 hearing on the parties' cross-motions for summary judgment.

I. INTRODUCTION

The subject property is bound by consensually-negotiated limitations contained in the QCA/Jacklin Agreement and Articles 2-6 of the Declaration of Covenants, Conditions, and Restrictions (last amended in 1989) incorporated through Subsection (iii) of the QCA/Jacklin Agreement. The Court has already determined, through its June 15, 2009 Memorandum Decision and Order on Cross-Motions for Summary Judgment, that the Defendants are utilizing the subject property in violation of Subsections (I), (ii), and (iii) of the QCA/Jacklin Agreement. Through its Second Motion for Summary Judgment (alternatively styled as a Motion for Reconsideration), Jacklin seeks an order, whether by declaratory relief or permanent injunction or both, that Defendants "cease and desist from using the subject property for the storage and/or parking of RVs by a date certain, and that any future uses of the subject property by either or both of the Defendants conform with the substance and procedures contained in the QCA/Jacklin Agreement and Articles 2-6 of the CC&Rs incorporated therein."

The material facts alleged in support of the Motion are not in dispute. The issue presented to the Court is purely one of law. In general terms, the Defendants accurately characterized that issue

as follows: whether Jacklin must demonstrate an irreparable harm or substantial damages in order to receive the injunctive/declaratory relief it requests? The issue is further clarified and refined as follows: whether irreparable harm or damages are necessary to support a request for permanent injunctive relief when one seeks to enforce a consensually-negotiated restriction on another's rights to use certain real property? The issue does not appear to have been squarely addressed by Idaho courts. However, the issue is neither novel nor unique to other jurisdictions. As set forth in Jacklin's opening Memorandum, and as further discussed herein, the considerable weight of authority supports the proposition that one who benefits from a consensually-negotiated restriction on another's right to use certain real property may enforce the same, by injunctive or declaratory relief, without the necessity of showing per se irreparable harm or quantifiable money damages.

> Since money damages need not be shown, nor are they an element of a claim for relief based upon restrictive covenants, any inquiry into the adequacy of a money damage remedy is simply unnecessary in this context. This may explain why our cases discussing restrictive covenants reflect no analysis of irreparable harm. The injuries sustained by the violation of such covenants is inherently irreparable in nature; i.e., one can generally never achieve a full, complete, and adequate remedy of the breach of restrictive covenants through recovery of calculable money damages . . . .

Persimmon Hill First Homes Assoc. v. Lonsdale, 31 Kan. App.2nd 889, 75 P.3d 278, 283 (2003).

II. UNDISPUTED MATERIAL FACTS.

The undisputed material facts alleged by Jacklin in support of its Motion were previously set forth at pages 3-5 of its opening Memorandum and are incorporated herein as though set forth in full.

III. PROCEDURAL BACKGROUND.

Jacklin's Complaint (filed August 22, 2008) included the following claims for relief: Declaratory Relief (Claim 4), and Permanent Injunction (Claim 3).

As to the claim for declaratory relief, Jacklin requested as follows:

> Plaintiff Jacklin is entitled to entry of declaratory relief adjudging and decreeing that the uses to which Defendants and each of them have placed the subject property [are] in violation of the terms of the recorded instruments that bind said property. Plaintiff Jacklin is further entitled to entry of declaratory relief adjudging that said usage, as alleged herein, cease and desist both pendente lite and post - judgment.

See Complaint at ¶ 39.

As to Jacklin's claim for a permanent injunction, Jacklin sought:

> entry of a permanent injunction ordering, directing, and decreeing that Defendants and each of them cease and desist from utilizing any and all portions of the subject property for purposes of a commercial RV sales and/or rental facility or business, and directing that Defendants and each of them take any and all steps necessary to comply with the terms of said preliminary [*sic*] injunction, including but not limited to the removal of any items of personal property that could or are utilized in the operation of such a business.

See Complaint at ¶ 36.

The Court has determined, as a matter of law, that the Defendants' usage of the subject property is in violation of the recorded limitations thereon. Jacklin seeks, through this motion, summary judgment consistent with the claims for declaratory relief and permanent injunction as set forth above. In particular, Jacklin seeks entry of declaratory relief and a permanent injunction declaring and decreeing that the uses to which Defendants have put the property, as already determined to be in violation of the recorded limitations impressed thereon, cease and desist by a date certain.

IV. ARGUMENT.

A. Irreparable Harm Is Presumed (And Need Not Separately Be Shown) in Order to Support Entry of Permanent Injunctive Relief to Ensure

Compliance with Consensually-Negotiated Covenants Burdening Real Property.

IRCP 65(e) is captioned "Grounds for Preliminary Injunction." (Emphasis added). Rule 65(e)(2) requires a showing of "waste, or great or irreparable injury to the plaintiff." Jacklin contends that the cited provisions of Rule 65(e), which, by their specific terms, are applicable to requests for "preliminary" injunctions, do not apply to a request for permanent injunctive relief to enforce compliance with a consensually-negotiated encumbrance upon real property.

In rejoinder, Defendants argue, "Jacklin fails to cite any case law that sets separate standards for the issuance of preliminary and permanent injunctions." See Defendants' Response at p. 5. This is simply untrue. In Jacklin's opening Memorandum, filed in support of its Second Motion for Summary Judgment (Motion for Reconsideration), Jacklin set forth a litany of cases from more than a dozen states that had specifically addressed the identical issue and that had unanimously found that irreparable harm is presumed, and money damages need not be shown, when a defendant is found to have violated consensually-negotiated restrictive covenants burdening real property. By way of example, and not by way of limitation, the Georgia Court of Appeals held:

> "[T]he violation of a restrictive covenant that is part of the development scheme affects the grantor and all other grantees, causing irreparable harm to the value of their respective property interests, because such restrictive covenant was part of the valuable contract consideration given and relied upon in the conveyance of the land. [Citation omitted.] Thus, irreparable harm automatically occurs as a matter of law arising from a violation of a covenant running with the land, the relationship of the parties as grantor/grantee, and the consideration of the conveyance of less than a fee simple absolute for the burden imposed upon the land in the form of a restrictive covenant to protect the grantor and others who may wish to purchase the remaining land in the future."

Focus Entertainment v. Partridge Greene, 253 Ga. App. At 127-28, 558 SE2d 440 (cited and favorably quoted in Persimmon Hill First Homes Assoc. V. Lonsdale, 31 Kan. App.2d 889, 75 P.3d

278, 283 (2003)).

In opposition, Defendants cite cases from the Idaho Supreme Court, the Ninth Circuit, and the United States Supreme Court, each holding that irreparable harm must specifically be shown in order for an injunction to issue. However, none of these cases are on point. They all deal with factual scenarios wherein the plaintiff seeks to enforce, by way of an injunction, a right arising in some manner other than through a consensually-negotiated recorded covenant.

In Ada County v. Fuhrman, 140 Idaho 230, 91 P.3d 1134 (2004), Ada County sought to enjoin the defendant landowners from adding fill dirt to their property without proper permits and without the submission of a necessary engineering report. The District Court granted Ada County a permanent injunction on summary judgment based upon Ada County's showing of irreparable harm. The request was predicated upon county ordinances. It was not predicated upon consensually-negotiated covenants such as those at bar or those addressed in the litany of cases cited in Jacklin's opening Memorandum.

In Bach v. Mason, 190 F.R.D. 567 (D. Idaho 1999), the Court entertained a motion for a permanent injunction to restrain the defendants from selling real property. The Court noted that such an injunction would require "the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." Bach v. Mason, 190 F.R.D. at 574. The facts did not involve a request for permanent injunctive relief to enforce benefits arising under a consensually-negotiated covenant burdening real property.

In EBAY v. Mercexchange, LLC, 547 U.S. 388 (2006), the Supreme Court entertained a request for a permanent injunction against an alleged patent infringement. The traditional standards of irreparable injury or inadequate remedies at law were favorably cited by the Court. However, the

claim to permanently enjoin a patent infringement has virtually nothing to do with a claim to permanently enjoin an already-determined to exist violation of consensually-negotiated covenants burdening specific real property.

In summary, the considerable weight of authority, as initially cited and discussed by Jacklin in its opening Memorandum, conclusively resolves the legal issue before the Court. The authorities cited by the Defendants, as discussed above, are inapposite and have virtually no applicability to the issue at bar.

B. Defendants Have Offered No Cogent Authority to Support the Proposition that Irreparable Injury or Damages Must Be Shown in Order to Support a Permanent Injunction to Enforce a Consensually-Negotiated Restrictive Covenant.

Defendants argue:

> Idaho clearly requires a plaintiff to show irreparable harm in order for an injunction to issue. Jacklin has cited no Idaho authority, or other binding authority, that relieves the plaintiff of this burden where a real property restrictive covenant is violated.

See Defendants' Response at p. 7.

For the reasons previously set forth, the first proposition Defendants seek to advance, as cited above, is incorrect. There is no Idaho case that shows that irreparable harm must be demonstrated in order to support a permanent injunction in the context of a consensually-negotiated real property covenant. As to Defendants' second proposition, Jacklin has in fact cited authority from nearly every state addressing the issue that is both squarely on point and which directly supports the granting of the relief Jacklin requests. The cases cited by Defendants are inapposite.

First, Defendants cite Holmes Harbor Water Co., Inc. v. Page, 8 Wn.App. 600, 508 P.2d 628 (1973) for the proposition that "Washington courts require a showing of necessity and irreparable

injury to be proven in restrictive covenant cases." This is not true. In Holmes Harbor Water Co., the plaintiffs sought to enforce restrictive covenants regulating the height of structures built on lots within a certain plat. The court declined to grant the requested relief, holding:

> The principal question of law raised by this dispute is whether plaintiff is entitled to a mandatory injunction. No plaintiff is entitled to such an injunction as of course, merely because of a violation of a covenant affecting real property, for which, to be sure, there is no adequate remedy at law. The allowance of injunctive relief is a discretionary matter, in that the Court may be called upon to give or withhold relief depending upon variables, namely, the circumstances of the case.

Holmes Harbor Water Co. v. Page, 508 P.2d at 631-32. The Court declined to grant the requested relief, finding, based on the circumstances of the case, that:

> The landowner acted innocently; he attempted to comply with the restrictive covenants; and his violation of it was unintentional. The plaintiffs delayed bringing suit until the construction was complete; they failed to prove any injury; and the cost of removing the violation was exorbitant when compared with the slight violation of the covenant.

Holmes Harbor Water Co. v. Page, 508 P.2d at 632. There are no such mitigating facts at bar. In this context, the Court has already held:

> The point is, given the terms of the [QCA/Jacklin] Agreement, approval needed to be sought by Blue Dog and KLP in the first instance. Instead, Blue Dog simply started its business on KLP's property without asking for approval from anyone. Blue Dog's business runs counter to the Agreement. Thus, Defendants' argument that "... Jacklin categorically failed to work with Blue Dog and KLP to address any site concerns that Jacklin had or to work on an acceptable plan", ignores the fact that Blue Dog's business, which was already existing, at that time and failed to conform with the Agreement.... Blue Dog put itself in violation by starting its business without checking (or if it checked, then disregarding) the terms of the Agreement. When Blue Dog is already in violation of the Agreement, through only its own fault, why would Jacklin have a duty to "work with" Blue Dog on acceptable plans? Keep in mind the Agreement at subsection ii, reads: "QCA/KLP's predecessor agrees to work together with Seller [Jacklin] to achieve a mutually acceptable design and appearance for the shopping center so that it shall be aesthetically pleasing and compatible with other uses within Riverbend Commerce Park." There was no "mutually acceptable design" to be worked toward because Blue Dog had already

implemented its business. This Court finds Jacklin's following argument persuasive:

> Russell finally concludes by stating that, "Blue Dog offered to undertake substantial site improvements, on the four undeveloped lots, including landscaping and surface work." See Russell Affidavit at ¶23. He concludes that there wasn't anything Blue Dog could do "to satisfy Jacklin's concerns short of vacating the premises." Id. Offering to pay $50,000 to put gravel on four vacant lots without addressing the paving requirement, as clearly specified in the November 1999 Covenants, together with the signage, lighting, setback, and landscaping requirements (ignoring for the moment the "first class shopping center" and "mutually acceptable design" criteria) is hardly a proposal meriting serious consideration. Why should Jacklin consider a proposal (even though one was never submitted) which is incapable of complying with the unambiguous provisions of the Covenants that KLP acknowledges it is bound by?

See "Memorandum Decision and Order" (entered June 15, 2009) at pp. 16-17 (emphasis in original).[1]

Significantly, a subsequent decision from the Washington Court of Appeals, which post-dates the Holmes Harbor Water Co. case by sixteen (16) years, supports the granting of the relief now requested by Jacklin. In W.E. Hagemann v. Worth, 56 Wn.App. 85, 782 P.2d 1072 (1989), the Washington Court of Appeals dealt with a request to permanently enjoin the defendants' use of a residential unit for business purposes. The Court found that the defendants' use of their residence constituted a "business," was in violation of the recorded covenants, and granted the plaintiffs' request for a permanent injunction against the business use. In so doing, the Court held:

---

[1]In fact, in its opening Memorandum, Jacklin noted that some courts, in considering a request for a permanent injunction to enforce a violation of a recorded covenant, apply a "balancing of the equities" test in lieu of the irreparable harm or substantial damage components. See Jacklin's "Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration" at pp. 12-14. For the reasons set forth therein, to the extent Washington has adopted such a test, and to the extent it is applicable to Idaho or adopted by Idaho, Defendants have failed to establish mitigating facts and this Court has so held.

> In Washington, owners of land have an equitable right to enforce covenants by means of a general building scheme designed to make it more attractive for residential purposes, without showing substantial damage from the violation . . . .

W.E. Hagmann v. Worth, 782 P.2d at 1074 (emphasis added). No requirement of irreparable harm or substantial injury was required by the Court, as a condition of granting the injunction, given the consensual nature of the limitation placed on the real property and the fact that there were no mitigating equitable considerations.

Second, Defendants cite the Montana case of Fox Farm Estates Landowners Assoc. v. Kreisch, 285 Mont. 264, 947 P.2d 79 (1997) for the proposition that one who seeks injunctive relief to enforce a restrictive covenant must "establish a *prima facie* case, or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated." Fox Farm Estates, 947 P.2d at 81. In actuality, Fox Farm Estates dealt with a request for a preliminary injunction to enforce restrictive covenants. The covenant at issue precluded "mobile homes" in the applicable subdivision. The issue is whether or not a manufactured home constituted a "mobile home." The trial court denied the request for preliminary injunctive relief and an appeal was taken. On appeal, the Montana Supreme Court reversed and ordered that the preliminary injunction issue. A heightened standard of proof was required because the plaintiffs requested a preliminary injunction. The requirements were similar to those set forth in IRCP 65(e), which, by its heading, similarly applies to requests for preliminary injunctions. The ultimate substance of the alleged violation had not then been adjudicated. In contrast, in this case, the violation has been determined to exist on summary judgment and the request before the Court is one for permanent injunctive relief. With the violation having been adjudicated, and the request being for a permanent injunction,

there is no requirement that substantial damages or irreparable harm be shown as the great weight of case law suggests that Jacklin is entitled to the benefit of its consensually-negotiated bargain.

Third, Defendants cite Narragansett Indian Tribe v. Guilbert, 934 Fed.2nd 4 (1st Cir. 1991) for the proposition that substantial damages or irreparable harm are a requirement of Jacklin's proof in order to sustain its request for permanent injunctive relief. The cited case does not deal with restrictive covenants. The case essentially involved building code restrictions claimed to be applicable to the defendant homeowner's attempted construction. Simply put, the case has nothing to do with the issue at bar.

Finally, Defendants cite Pub. Sev. Co. Of N.H. v. Town of W. Newbury, 835 F.2d, 380 (1st Cir. 1987). Yet that case, like the Narragansett case, had nothing to do with consensually-negotiated covenants. The case involved a request for injunctive relief to prevent the City of W. Newbury from removing utility poles. As with Narragansett, the case has nothing to do with the issue at bar.

C. Defendants Have Offered No Other Cogent Basis Supporting the Denial of Jacklin's Request.

Defendants argue that Jacklin can seek money damages in lieu of permanent injunctive relief and that those damages might compensate Jacklin for the Defendants' violations of the applicable instruments. As has already been discussed, both in this Memorandum and in Jacklin's opening Memorandum, the benefit of the bargain in the context of consensually-negotiated recorded covenants is to enforce the covenants as written.

> "Enforcing a restrictive covenant is important to all who are burdened and benefitted by the restriction. For precisely that reason, Plaintiffs seeking to enforce restrictive covenants need not establish money damages or any other hardship to receive equitable relief. . . ."

Ridgewood Homeowners Assoc. v. Mignacca, 813 A.2d 965, 975 (2003) (citation omitted).

Second, Defendants argue that Jacklin should not be entitled to the relief requested because "an injunction will not issue where its effect is to give the plaintiff the principal relief he seeks without bringing the cause to trial." See Defendants' Response at p. 10. In support of this proposition, Defendants cite IRCP 65(e) and three Idaho cases. As noted, Rule 65(e), captioned "Grounds for Preliminary Injunction," does not apply to requests for permanent injunctive relief seeking to enforce consensually-negotiated covenants burdening real property. The cases cited by Defendants are similarly distinguishable. Each of these three cases (Rowland v. Kellogg Power & Water Co., 40 Idaho 216, 233 P. 869 (1925); White v. Coeur d'Alene Big Creek Mining Co., 56 Idaho 282, 55 P.2d 720 (1936); and Gilbert v. Elder, 65 Idaho 383, 144 P.2d 194 (1943)) were decided in the context of requests for temporary or preliminary injunctive relief. The request made by Jacklin is for permanent injunctive relief. It makes no difference that the granting of said relief, in the context of permanent injunctive relief, will grant Jacklin all of the relief it seeks. The case law cited by Jacklin is in accord.

The granting of permanent injunctive relief is appropriate given that the Court has already determined that Defendants, as a matter of law, have violated the recorded instruments that burden their property. The violations have been established. The only remaining question is the relief to which Jacklin is entitled. The request for permanent injunctive relief, if granted, will end the case. There is no necessity of a trial to establish the likelihood of damages orany irreparable harm given that irreparable harm and damages are unnecessary under the great weight of authority when consensually-negotiated covenants are at issue. The only conceivable argument that Defendants could make to the contrary is based upon the line of cases emphasizing a balancing of the equities.

Yet, for the reasons set forth above, and based upon the determinations already made by the Court in its June 15, 2009 Memorandum Decision and Order on Cross-Motions for Summary Judgment," there are no equitable considerations advanced by Defendants, nor could there be, to mitigate against the granting of permanent injunctive relief.

V. CONCLUSION.

Based upon the reasons and authorities set forth herein, Plaintiff Jacklin Land Company respectfully requests that the Court grant Jacklin's Second Motion for Summary Judgment and/or Jacklin's Motion for Reconsideration on Jacklin's claims for permanent injunctive relief and/or declaratory relief as to those violations already determined to exist by this Court through its June 15, 2009 "Memorandum Decision and Order on Cross-Motions for Summary Judgment." That relief should, at a minimum, consist of declaratory and/or injunctive relief ordering and decreeing that Defendants and each of them cease and desist from using the subject property for the storage and/or parking of RVs by a date certain, and that any future uses of the subject property by either or both of the Defendants conform with the substance and procedures contained in the QCA/Jacklin Agreement and Articles 2-6 of the CC&Rs incorporated therein.

DATED this 6th day of August, 2009.

JOHN F. MAGNUSON
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2009, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael J. Hines	
Michael Schmidt	__X__ US Mail
Lukins & Annis, P.S.	____ Overnight Mail
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JACKLIN-BLUE DOG.REPLY.BRF.wpd

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

vs.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

CASE NO. CV-08-6752

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION

COMES NOW Plaintiff Jacklin Land Company (hereafter "Jacklin"), by and through its attorney of record, John F. Magnuson, and respectfully submits this Memorandum in opposition to the Defendants' Motion for Reconsideration (filed July 27, 2009). This Memorandum is supported by the pleadings and submissions on file herein, including the submissions previously filed by Jacklin in conjunction with the March 3, 2009 hearing on the parties' Cross-Motions for Summary Judgment and the submissions filed by Jacklin in support of its now-pending Second Motion for Summary Judgment (alternatively styled as one for reconsideration).

I. UNDISPUTED MATERIAL FACTS

The undisputed material facts alleged by Jacklin in opposition to the Defendants' Motion for Reconsideration are contained in materials previously presented to the Court as follows:

(1) Plaintiff's Statement of Undisputed Material Facts Re: Plaintiff's Motion for Summary Judgment (filed December 11, 2008);

(2) Material facts alleged in support of Plaintiff's Second Motion for Summary Judgment (alternatively styled as one for reconsideration) (filed with the Court on July 13, 2009); and

(3) The material facts as determined to be undisputed by the Court in its June 15, 2009 "Memorandum Decision and Order on Cross-Motions for Summary Judgment."

At this point in the proceedings, and having reviewed the parties' submissions in anticipation of the August 10, 2009 hearing date, the Court is well-acquainted with those facts and they will not be repeated here.

II. APPLICABLE STANDARD.

As noted by Defendants, the applicable standard to apply in resolving motions for reconsideration under IRCP 11(a)(2)(B) has been stated as follows:

> A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation on all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

Coeur d'Alene Mining Co. v. First Nat'l. Bank of Idaho, 118 Idaho 812, 823, 800 P.2d 1026 (1990). The Plaintiff's Motion for Reconsideration (alternatively styled as a second motion for summary judgment) is based upon a more comprehensive presentation of law. The Defendants' Motion for Reconsideration is supported by additional factual submissions, but those factual submissions essentially include (with the exception of Plaintiff's responses to Defendants' discovery requests) matters already made a part of the record through prior proceedings.

III. ARGUMENT.

A. Jacklin Need Not Prove that It Suffered Irreparable Injury in order to Obtain the Relief Requested.

Jacklin's Complaint (filed August 22, 2008) included the following claims for relief: Declaratory Relief (Claim 4), and Permanent Injunction (Claim 3).

As to the claim for declaratory relief, Jacklin requested as follows:

> Plaintiff Jacklin is entitled to entry of declaratory relief adjudging and decreeing that the uses to which Defendants and each of them have placed the subject property [are] in violation of the terms of the recorded instruments that bind said property. Plaintiff Jacklin is further entitled to entry of declaratory relief adjudging that said usage, as alleged herein, cease and desist both pendente lite and post - judgment.

See Complaint at ¶ 39.

As to Jacklin's claim for a permanent injunction, Jacklin sought:

> entry of a permanent injunction ordering, directing, and decreeing that Defendants and each of them cease and desist from utilizing any and

> all portions of the subject property for purposes of a commercial RV sales and/or rental facility or business, and directing that Defendants and each of them take any and all steps necessary to comply with the terms of said preliminary [*sic*] injunction, including but not limited to the removal of any items of personal property that could or are utilized in the operation of such a business.

See Complaint at ¶ 36.

The Court has determined, as a matter of law, that the Defendants' usage of the subject property is in violation of the recorded limitations thereon. Jacklin seeks, through its companion motion, summary judgment consistent with the claims for declaratory relief and permanent injunction as set forth above. In particular, Jacklin seeks entry of declaratory relief and a permanent injunction declaring and decreeing that the uses to which Defendants have put the property, as already determined to be in violation of the recorded limitations impressed thereon, cease and desist by a date certain.

Having now reviewed the entirety of the parties' submissions, including Jacklin's submissions in support of its Second Motion for Summary Judgment, the Court is aware of the considerable weight of authority that negates the Defendants' contention that "Jacklin must prove that it suffered irreparable injury" in order to obtain the permanent injunctive relief it requests. By way of example, and not by way of limitation, the Georgia Court of Appeals has held:

> "[T]he violation of a restrictive covenant that is part of the development scheme affects the grantor and all other grantees, causing irreparable harm to the value of their respective property interests, because such restrictive covenant was part of the valuable contract consideration given and relied upon in the conveyance of the land. [Citation omitted.] Thus, irreparable harm automatically occurs as a matter of law arising from a violation of a covenant running with the land, the relationship of the parties as grantor/grantee, and the consideration of the conveyance of less than a fee simple absolute for the burden imposed upon the land in the form of a restrictive covenant to protect the grantor and others who may wish to purchase the remaining land in the future."

Focus Entertainment v. Partridge Greene, 253 Ga. App. At 127-28, 558 SE2d 440 (cited and favorably quoted in Persimmon Hill First Homes Assoc. V. Lonsdale, 31 Kan. App.2d 889, 75 P.3d 278, 283 (2003)) (emphasis added). Or, as the Kansas Court of Appeals has alternatively stated:

> Since money damages need not be shown, nor are they an element of a claim for relief based upon restrictive covenants, any inquiry into the adequacy of a money damage remedy is simply unnecessary in this context. This may explain why our cases discussing restrictive covenants reflect no analysis of irreparable harm. The injuries sustained by the violation of such covenants is inherently irreparable in nature; i.e., one can generally never achieve a full, complete, and adequate remedy of the breach of restrictive covenants through recovery of calculable money damages . . . .

Persimmon Hill First Homes Assoc. v. Lonsdale, 31 Kan. App.2nd 889, 75 P.3d 278, 283 (2003) (emphasis added).

B. Jacklin Was Not Required to Prove Irreparable Injury at the Summary Judgment Stage.

The Defendants contend that Jacklin's Second Motion for Summary Judgment and/or Motion for Reconsideration "do not allege additional facts or point to any new evidence of irreparable injury" and that Jacklin did not provide the Court "with evidence of waste or great injury" in prior summary judgment proceedings. There is nothing improper with the proof before the Court or the method and manner by which Jacklin has chosen to proceed. Again, the considerable weight of authority, previously provided to the Court in support of Jacklin's Second Motion for Summary Judgment (both through Jacklin's opening Memorandum and through the Reply Memorandum filed herewith), supports Jacklin's position. It is noteworthy that Defendants have offered no contrary authority on point or close to on point. Defendants essentially seek to cite cases that have nothing to do with the enforcement of obligations under consensually-negotiated covenants through permanent injunctive relief.

C. **Jacklin's Rule 30(b)(6) Designee (Tom Stoesser) Did Not Testify that Jacklin Had Not Been Damaged or Irreparably Injured**.

Defendants argue that Mr. Stoesser unequivocally offered no proof that Jacklin was or would be damaged by the Defendants' actions. However, this is not what Mr. Stoesser testified to at deposition.

> Q. Can you describe for me in general terms the nature of the tenant base that you have out there at the Riverbend Commerce Park as it's been developed?
>
> A. Yes. We've marketed ourselves as the premier commerce park in North Idaho with success. We've landed nationally-acclaimed tenants in there. Tapmatic Corporation, their worldwide facility is in Riverbend Commerce Park on the water.
>
> We were instrumental in relocating Buck Knives from California. On the front page of the business section this morning was an article about the high-end facility that Alk Abello is putting in. Generally, people that come to Riverbend Commerce Park want to acquire land there with the hope of appreciation because of the quality of the park.
>
> Q. Have you been involved in negotiation of the lease arrangements with the tenants that you've just described?
>
> A. Yes.
>
> . . .
>
> Q. That's a good point to note. And you've been in that process for 20 years?
>
> A. Yes. Sir.
>
> Q. Would it be fair to say that ultimately no tenant or prospective purchaser of a given nature is allowed in the Riverbend Commerce Park absent your prior approval?
>
> A. That's correct.
>
> Q. Based on that knowledge and experience, do you have an opinion one way or another as to whether or not the continued maintenance of the Blue Dog RV center in its current form for the remaining term of the lease that we understand exists would cause any damage to Jacklin Land Company?

A. I personally feel it would.

Q. And by that, counsel asked you some questions about damage that you could articulate as of today. I am looking for your opinion based on your personal knowledge as a representative of the owner of the property, whether you expect to suffer irreparable harm in the next 4 and ½ years if the Blue Dog RV Center continues in its current status?

A. I do. I think we will either lose prospective tenants, or will be forced to - -. I guess that's the best way to put it - - forego land sales because people won't want to buy in there.

Q. Why do you believe that?

A. Because as I stated before, most people come to Riverbend Commerce Park because it's the premier commerce park in the area. Many tenants have the option to locate in commerce parks that are less restrictive, have lower-priced land, and allow a lower level of building design. So those that come to Riverbend are basically paying a premium for their facilities over many lower-end parks.

See Affidavit of Michael J. Hines (filed July 27, 2009) at Ex. A, pp. 115-118.

In rejoinder, Defendants argue that Jacklin has been unable to identify some party or person who didn't or wouldn't buy in Riverbend Commerce Park because of the existence of the Blue Dog Shanty Town. Essentially, Defendants seek to impose an obligation upon Jacklin to prove an event that Jacklin may well be unable to discover. How can Jacklin prove that a prospective purchaser chose not to pursue a purchase or lease in the Park because that purchaser chose not to contact Jacklin after having seen the Blue Dog facility that greets passers-by and determining to look elsewhere as a result thereof? It is precisely for these reasons that proof of irreparable harm or actual damage is not required, and is in fact legally presumed, when one seeks to enforce a violation of a restrictive covenant through a preliminary injunction.

> As a general rule, a restrictive covenant may be enforced irrespective of the amount of damage which would result from the breach, and even though there is no substantial monetary damage to the complainant by reason of the violation. The right

> to enjoin the breach of restrictive covenants does not depend upon whether the covenantee will be damaged by the breach; the mere breach is sufficient ground for interference by injunction. Thus, for example, restrictive covenants as to the nature, location, or use of buildings, will be enjoined even though no substantial damage is shown. A landowner in a subdivision seeking to enjoin a violation of a residential-only covenant need not show irreparable injury when there has been a substantial breach of the covenant.

20 Am.Jur.2d Covenants, Conditions, and Restrictions, § 277, pp. 695-96.

In summary, evidence of irreparable harm or damage was not necessary as part of Jacklin's proof in prior summary judgment proceedings or in this summary judgment proceeding. Given the Court's determination that the Defendants have unquestionably breached the covenants that burden their property, and intentionally done so, the inquiry of irreparable harm or damage is unnecessary and Jacklin is entitled to the relief requested regardless of how Defendants chose to characterize Mr. Stoesser's testimony.

D. Jacklin's "Failure" to Identify An Expert Witness Is Irrelevant.

Jacklin's testimony as to damages or irreparable harm is not necessary in order for Jacklin to obtain the permanent injunctive relief requested. The case law on the issue is clear. Notwithstanding the same, if such testimony is necessary, then the testimony will come from Mr. Stoesser who has been disclosed. Some seven months ago, at his deposition, Mr. Stoesser advised Defendants as much:

> Q. Have you engaged an expert to assess whether or not the RV operation would cause Jacklin to lose tenants or to forego land sales?
>
> A. No. We're the expert.

See Hines Affidavit (filed July 27, 2009) at Ex. A., p. 121. In December of 2008, Mr. Stoesser was specifically identified as an individual with knowledge of the facts and circumstances giving rise to the allegations in Jacklin's Complaint. Id. at Ex. B, p. 2. When asked to identify witnesses expected

to testify at trial, Jacklin answered that it had not yet made a determination, but "that it is reasonable to presume that those individuals identified [as having personal knowledge]," including Mr. Stoesser, "will likely be called to testify at trial." Id. at p. 4.

Moreover, Mr. Stoesser is qualified to offer damage testimony, as an agent of the owner of the property at issue. "Ownership of property is generally considered sufficient to render admissible the owner's opinion as to its value, but such admissibility is often predicated on the presumption that the owner knows what his or her property is worth." 22 Am.Jur.2nd Damages, § 755. The owner's representative (Tom Stoesser) was seasonably disclosed and, under generally-accepted principles, the owner of properties competent to testify about his damages. Table Steaks v. First Premier Bank, N.A., 650 N.W.2d 829 (S.D. 2002). Defendants can claim no prejudice because they have known for nine months that Mr. Stoesser had personal knowledge of the matters at issue and have had the benefit of his testimony for eight months. Even so, Defendants' argument is much ado about nothing: damages or irreparable harm have nothing to do with the determination to grant the permanent injunctive relief requested through Jacklin's Second Motion for Summary Judgment.

E. A Request for Damages in the Complaint is Irrelevant to a Request for Permanent Injunctive Relief.

Defendants argue that Jacklin cannot obtain the permanent injunctive relief it requests because it did not assert a prayer for relief for damages. This argument fails for two reasons. First, it presupposes that damages are a necessary element of proof in a request for permanent injunctive relief to enforce a consensually-negotiated real property covenant. The considerable weight of authority suggests that such an element is not required.

Second, to the extent that such an element is required, it is subsumed as an element of the claim for permanent injunctive relief, which was unquestionably plead. In other words, damages or irreparable harm, to the extent necessary, may be proven as an element of the request for permanent injunctive relief without a concurrent request for an award of damages under a breach of contract claim.

It is for the precise reasons relied upon by Defendants in support of their Motion for Reconsideration that a showing of damages is not necessary to an award of permanent injunctive relief in the context at bar. Why should a party who consensually agrees to limit his or her use of their property, in a given manner, be allowed to violate those terms and escape liability or responsibility simply because it is difficult to quantify the injury asserted by the complaining party? The underlying point is that it was important enough to the parties to reach agreement to restrict another's use of his or her property. That in and of itself is sufficient to support a claim for permanent injunctive relief. This point has not been lost on courts who have passed upon the issue:

> Having found [Plaintiff] is entitled to declaratory relief, we now turn to whether the master erred in refusing to grant [Plaintiff] an injunction restraining and enjoining [Defendant] from using her property to operate a bed and breakfast operation in the future. [Defendant] summarily argues, that because the award of damages would provide [Plaintiff] an adequate remedy at law, he is not entitled to the intervention of equity by way of injunctive relief....
>
> Although an injunction, like all equitable remedies, is granted as a matter of sound judicial discretion, and not as a matter of legal right, ... the right of a Plaintiff to an injunction to enforce restrictive covenants has long received special treatment. See Sprouse v. Winston, 212 S.C. 176, 46 S.E.2d 874 (1948) (While it is true that the awarding of an injunction is addressed to the conscience of the Court, this rule is not applicable where it clearly appears that an injunction is necessary to prevent one from violating the equitable rights of another where he has notice, actual or constructive, of such rights); 43 Ac. J. S. *Injunctions* §100 (1978) (Restrictions which are fixed, definite, and unambiguous should be enforced as written and should not be extended by judicial construction)....

450 S.E.2d at 418 (additional citations omitted).

V. CONCLUSION.

For the reasons and authorities set forth herein, Plaintiff Jacklin Land Company respectfully requests that the Court deny the Defendants' Motion for Reconsideration.

DATED this 6th day of August, 2009.

JOHN F. MAGNUSON
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2009, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael J. Hines	
Michael Schmidt	__X__ US Mail
Lukins & Annis, P.S.	____ Overnight Mail
1600 Washington Trust Financial Center	____ Hand Delivered
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COUNTY OF KOOTENAI) SS
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

v.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

NO. CV-08-6752

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION

I. INTRODUCTION

Defendants hereby submit this reply in support of their Motion for Reconsideration. The Court already determined as a matter of law that in order for an injunction to issue in this case, Jacklin must present evidence of waste or irreparable injury pursuant to I.R.C.P. 65(e). See *Memorandum Decision and Order on Cross-Motions for Summary Judgment* ("Decision and Order"), p. 25. The Court also found as a matter of law that Jacklin failed to show any evidence of waste or great injury at the summary judgment stage. Id.

Notably, Jacklin did not present any further evidence of injury in its Second Motion for Summary Judgment, and will not be able to present any further evidence of injury at trial. For these reasons, Defendants respectfully request the Court to grant their Motion for Reconsideration and enter an order that 1) an injunction cannot issue because Jacklin has suffered no irreparable injury; and 2) Jacklin is not entitled to damages because it failed to request them in its Complaint or otherwise notify Defendants that it was seeking damages.

II. REPLY ARGUMENT

A. JACKLIN MUST PRESENT EVIDENCE OF GREAT OR IRREPARABLE INJURY IN ORDER FOR AN INJUNCTION TO ISSUE.

As set forth in *Defendants' Response to Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration*, the Court correctly applied the standard set forth in I.R.C.P. 65(e) to determine that an injunction could not issue at the summary judgment stage of this case, and that in order for an injunction to issue, Jacklin must present evidence of great or irreparable injury. Jacklin argues that it doesn't have to show that it suffered an injury in this case. Jacklin's argument fails for the following reasons: 1) Idaho doesn't have different

standards for preliminary and permanent injunctions, 2) Jacklin has not shown that Idaho recognizes an exception to the requirement to show irreparable injury in the restrictive covenant context, and 3) Jacklin is in fact seeking a preliminary injunction so irreparable injury must be shown.

Idaho follows the same standard in deciding whether to issue a preliminary injunction or a permanent injunction, and Jacklin has not presented any Idaho authority to the contrary[1]. There's no question that great or irreparable injury must be established in order for a preliminary injunction to issue. I.R.C.P. 65(e)(2); Harris v. Cassia County, 106 Idaho 513, 681 P.2d 988 (1984). Notably, the Idaho Supreme Court, the Ninth Circuit, and the U.S. Supreme Court, have each held that irreparable harm must be shown in order for a permanent injunction to issue. Ada County v. Fuhrman, 140 Idaho 230, 91 P.3d 1134 (2004); Bach v. Mason, 190 F.R.D. 567 (D.Idaho 1999); Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1495 (9th Cir.1996); Northern Cheyenne Tribe v. Norton, 503 F.3d 836, 843 (9th Cir. 2007); eBay Inc. v. MercExchange, L.L.C., 547 U.S.388, 391 (2006). In Idaho, the legal standards for a preliminary and permanent injunction are the same, so in order for an injunction to issue, Jacklin must show irreparable injury.

Jacklin has not cited any Idaho case law to support its argument that irreparable injury is presumed where a restrictive covenant is breached. Furthermore, several states still require a showing of irreparable harm in a restrictive covenant context, and the First Circuit has rejected an exception to the irreparable injury rule simply because real property is involved. Defendants

[1] There is some indication in I.R.C.P. 65(e) itself that the rule applies to permanent injunctions as well. I.R.C.P. 65(e)(1) states that an injunction may issue where the relief sought "consists in restraining the commission or continuance of the acts complained of, either for a limited period ***or perpetually***." I.R.C.P. 65(e)(1) (emphasis added).

cited Holmes Harbor Water Co., Inc. v. Page, 8 Wn.App. 600, 508 P.2d 628 (Div.I 1973), a Washington Court of Appeals Division I opinion to support their position, and Jacklin cited a Court of Appeals Division III opinion to support its position. To the extent these decisions are inconsistent with regard to proof of injury, at a minimum they establish that a per se injury in the restrictive covenant context is not a well-settled and general rule in Washington, let alone other jurisdictions. Jacklin's attempt to distinguish the Montana case law is irrelevant because, as discussed below, Jacklin is in fact seeking a preliminary injunction in this case. The case makes it clear that Montana requires a showing of irreparable injury in order for a preliminary injunction to issue and does not recognize an exception in restrictive covenant cases. Fox Farm Estates Landowners Ass'n v. Kreisch, 285 Mont. 264, 268, 947 P.2d 79 (1997). The First Circuit case law is relevant to this issue because, as in this case, those cases involved alleged damage to real property based on breaches of agreements. Narragansett Indian Tribe v. Guilbert, 934 F.2d 4 (1st Cir.1991); Pub. Serv. Co. of N.H. v. Town of W. Newbury, 835 F.2d 380 (1st Cir. 1987).

Although Jacklin continues to couch this motion as one for a permanent injunction, it is in fact a motion for a preliminary injunction because there has not been a trial in this matter. The Court recognized in its *Decision and Order* that I.R.C.P. 65(e) sets forth the legal standard, and, barring evidence of irreparable injury, it cannot issue an injunction where doing so would give Jacklin the principal relief it seeks without bringing the case to trial. See *Decision and Order*, pp. 26-27.

In sum, Idaho law requires Jacklin to show irreparable injury in order for a preliminary or permanent injunction to issue, Idaho has not adopted the per se injury rule in the restrictive

covenant context, per se injury is not the general rule, and since the remedy Jacklin seeks is in fact a preliminary injunction, I.R.C.P. 65(e) is the correct legal standard.

B. JACKLIN HAS NOT PRESENTED ANY ADDITIONAL EVIDENCE OF IRREPAREABLE INJURY, AND WILL NOT BE ABLE TO INTRODUCE SUCH EVIDENCE AT TRIAL.

Based on the evidence provided at summary judgment, which included the testimony of Tom Stoeser, Jacklin's 30(b)(6) designee, the Court determined that Jacklin did not show any evidence of waste or great injury, or any damages. See *Decision and Order*, p. 25. The Court related some hypothetical examples of the types of injuries that Jacklin may have suffered, but Jacklin cannot, and has not, shown in its Second Motion for Summary Judgment, that it suffered an irreparable injury or any damages. As a result, when this matter proceeds to trial, Jacklin will be bound by the testimony of Mr. Stoeser – testimony the Court has already determined to be insufficient to establish any injury to Jacklin.

Jacklin's failure to identify an expert witness, or any other witnesses, will likewise limit the evidence it can produce at trial regarding damages. Jacklin failed to identify witnesses pursuant to the Court's scheduling order or Defendants' discovery requests, and thus it should be precluded from calling an expert at trial. I.R.C.P. 16(i); McKim v. Horner, 143 Idaho 568, 149 P.3d 843 (2006); I.R.C.P. 26(e)(1); Clark v. Klein, 137 Idaho 154, 45 P.3d 810 (2002).

Even if Mr. Stoeser is deemed an expert, as Jacklin asserts, he cannot contradict the testimony he provided as Jacklin's 30(b)(6) designee, which the Court has already found to be insufficient regarding injury. Rainey v. American Forest and Paper Association, Inc., 26 F. Supp.2d 82, 94-95 (D.C. 1998) (purpose of rule 30(b)(6) is to "prevent a corporate defendant

from thwarting inquiries during discovery, then staging an ambush during a later phase of the case").

In sum, Jacklin did not provide sufficient evidence at summary judgment in order for an injunction to issue and it did not allege any additional evidence of injury in its second motion for summary judgment. Furthermore, Jacklin is precluded from presenting testimony that will contradict Mr. Stoeser's testimony, and is precluded from presenting any evidence regarding damages from other witnesses at trial based on its failure to disclose additional witnesses.

C. JACKLIN IS NOT ENTITELD TO RECOVER MONETARY DAMAGES IN THIS CASE.

As set forth above, Jacklin is not entitled to injunctive relief because it cannot show that it suffered an irreparable injury. As a result, Jacklin's only potential remedy would be monetary damages. However, Jacklin did not request monetary damages in its Prayer for Relief as required by I.R.C.P. 8(a)(1), or otherwise give Defendants any indication that it was seeking monetary damages, so it is not entitled to recover monetary damages.

Jacklin misconstrues Defendants' argument regarding damages and appears to confuse the requirement of proving irreparable injury with the potential remedy of recovering monetary damages. Defendants are not asserting that Jacklin was required to ask for monetary damages in its Prayer for Relief in order for an injunction to issue. It's clear that Idaho law requires Jacklin to prove irreparable injury in order for an injunction to issue. Defendants are asserting that even if Jacklin could prove monetary damages, it is not entitled to a remedy of monetary damages because it did not request monetary damages in its Complaint, and it never put Defendants on notice that it was seeking monetary damages.

III. CONCLUSION

For the reasons set forth above, Defendants respectfully request the Court to reconsider its *Decision and Order* regarding *Defendants' Cross-Motion for Summary Judgment* on the issue of injury and damages. Defendants request this Court to enter an order that 1) an injunction cannot issue because Jacklin has suffered no irreparable injury; and 2) Jacklin is not entitled to damages because it failed to request them in its Complaint or otherwise notify Defendants that it was seeking damages.

DATED this 7th day of August, 2009.

LUKINS & ANNIS, P.S.

By _____
MICHAEL J. HINES
ISB #6876
PETER J. SMITH IV
ISB #6997
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of August, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

JOHN F. MAGNUSON
1250 Northwood Center Ct.
P.O. Box 2350
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Attorney for Plaintiff

- ☐ U.S. Mail
- ☑ Hand Delivered
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- ☐ Telecopy (FAX) to (208) 667-0500

KRIS SCOTT

S E OF IDAHO)
County of KOOTENAI)ss
FILED 9-14-09
AT 5:00 O'Clock P M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

vs.

BLUE DOG RV, INC., an Idaho corporation, et al.

Defendants.

Case No. **CV 2008 6752**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION, GRANTING PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT, AND DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

I. PROCEDURAL HISTORY AND BACKGROUND.

On June 15, 2009, this Court filed its "Memorandum Decision and Order on Cross-Motions for Summary Judgment." At the conclusion of that twenty-seven page decision, this Court ordered as follows:

> **IT IS HEREBY ORDERED** plaintiff's motion for summary judgment is GRANTED in favor of plaintiffs on the following issues: 1) The QCA/Jacklin Agreement is enforceable against defendants; 2) the Agreement is a "Use" agreement and not a "development" agreement; 3) Articles 2, 3, 4, 5, and 6 of the Declaration of Covenants, Conditions, and Restrictions apply to defendants; 4) defendants have violated the Agreement.
>
> **IT IS FURTHER ORDERED** plaintiff's motion for summary judgment is DENIED as to its entitlement to declaratory relief sought (eviction) and injunctive relief sought, at this time.
>
> **IT IS FURTHER ORDERED** defendant's motion for summary judgment is DENIED in all aspects, and specifically, this Court finds plaintiff has not breached the covenant of good faith and fair dealing and defendants are not entitled to the defense of waiver or estoppel.

On July 13, 2009, plaintiff Jacklin Land Company (Jacklin) filed "Plaintiff's Motion for Reconsideration", "Plaintiff's Second Motion for Summary Judgment", and "Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration." On July 27, 2009, defendants filed a "Response to Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration. On July 27, 2009, defendants (collectively referred to as "Blue Dog") also filed "Defendants' Motion for Reconsideration", a "Memorandum in Support of Defendants' Motion for Reconsideration" and an "Affidavit of Michael J. Hines in Support of Defendants' Motion for Reconsideration." On August 5, 2009, Jacklin filed its "Reply Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration." On August 7, 2009, defendants filed their "Reply Memorandum in Support of Defendants' Motion for Reconsideration." Oral argument on all these motions was held on August 10, 2009. At oral argument, this Court had read all briefs submitted on the motions, but several cases had been cited to the Court and the Court did not have the opportunity to read each of these cases prior to oral argument. Since these cases appeared to be pivotal, the Court took the matter under advisement. The Court has read the cases submitted by counsel for each side.

As an aside, at oral argument, counsel for defendants stated they had no objection to Plaintiff's Motion to Alter Timelines in the Court's Pre-Trial Order. Jacklin had moved this Court to alter the deadlines set forth in its January 5, 2009, Scheduling Order, which provides motions for summary judgment shall be filed so as to be heard no less than 90 days before trial. Motion to Alter Timelines, p. 2. Jacklin filed its second motion for summary judgment on June 13, 2009, in response to this Court's Memorandum Decision and Order on the parties' cross-motions for summary judgment. As a result of defendants' no objection, Jacklin's Motion to Alter Timeline in the Court's

Pre-Trial Order was granted.

Jacklin's second motion for summary judgment requests the same relief, and sets forth the same arguments, as its motion for reconsideration. Defendants have not objected to the Motion to Alter Timelines. Thus, the motion to alter timelines is granted.

The following are the facts as recited by this Court in its June 15, 2009, Memorandum Decision and Order on Cross-Motions for Summary Judgment:

> As part of plaintiff Jacklin Land Company's (Jacklin) development of the Riverbend Commerce Park, which was platted in 1988, Jacklin recorded an original set of covenants, "Declaration of Covenants, Conditions, and Restrictions of Riverbend Commerce Park." Affidavit of Tom Stoeser, Exhibit B. These covenants were later amended in 1989. The amended covenants encumbered the property which is presently leased by defendant Blue Dog RV, Inc. (Blue Dog), which is the subject of this litigation. Affidavit of Tim Stoeser, Exhibit C.
>
> In 1990, Quality Centers Associates (QCA), the predecessor in interest of defendant KL Properties, Inc. (KLP), wished to purchase the property KLP now owns, and QCA asked Jacklin to remove the 1989 covenants then in effect, as a matter of title. Jacklin agreed on the terms and conditions memorialized in the QCA/Jacklin Agreement (hereinafter "Agreement"), dated November 7, 1990, which removed the then-existing Declaration of Covenants, Conditions, and Restrictions in return for QCA agreeing: (1) to construct and maintain a first-class shopping center; (2) to work with Jacklin to achieve a mutually accepted design and appearance for the shopping center, and (3) to agree to comply with Articles 2,3,4,5, and 6 of the Declarations of Covenants, Conditions, and Restrictions recorded in 1988, as subsequently amended. Affidavit of Pat Leffel, Exhibit B. This agreement between QCA and Jacklin was unique to the property now at issue, Lots 1 to 4 (of Lots 1 to 17) of Block 1 of Phase I of the development, and differs from the covenants applicable to the Riverbend Commerce Park generally. After purchasing lots 1 to 17, QCA worked with Jacklin and achieved a mutually acceptable design and appearance for the Factory Outlets on Lots 5-17 of Block 1. In 2005, KLP purchased the property from QCA, including Lots 1 to 17 of Block 1.
>
> On July 1, 2008, Blue Dog entered into a lease with KLP for Lots 1-4 of Block 1. Jacklin filed its motion for summary judgment on December 11, 2008. Jacklin moves for summary judgment on its claims for a permanent injunction prohibiting the use of the property for an RV dealership/facility and for declaratory judgment that the uses the defendants have put the property to violate the QCA/Jacklin Agreement. Defendants argue no interpretation of the Agreement would prohibit Blue Dog's RV Center. Defendants argue Jacklin has not made a showing of irreparable injury to support injunctive relief. Defendants argue Jacklin itself breached the Agreement. Finally, defendants argue defendants'

> waiver and estoppel defenses preclude summary judgment in Jacklin's favor. On February 17, 2009, defendants filed "Defendants Cross-Motion for Summary Judgment." Following extensive briefing and submission of affidavits by both parties, which the Court has considered, oral argument was heard on March 3, 2009. On March 31, 2009, Jacklin filed a "Supplemental Citation of Authority by Plaintiff." That supplemental authority is *Bushi v. Sage Health Care, PLLC,* 2009 Opinion No. 30, 09.6 ISCR 244 (March 4, 2009), a case concerning good faith and fair dealing.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 1-3.

This case is scheduled for a Court trial on September 21, 2009. Each side has now presented motions which would essentially obviate the need for trial.

Jacklin argues case law from other jurisdictions holds Jacklin does not need to prove irreparable injury when seeking a permanent injunction to enforce a consensually negotiated limitation on the use of real property (restrictive covenant). Jacklin claims that these cases show that essentially, once breach has been shown, that is all that is needed for a permanent injunction.

Blue Dog argues Jacklin does need to prove irreparable harm in order to obtain an injunction. Blue Dog further argues that, Jacklin has not and cannot prove irreparable harm; thus, their motion for reconsideration should be granted and Jacklin's permanent injunction claims should be dismissed.

II. STANDARD OF REVIEW.

At issue are both cross-motions for reconsideration and a second motion for summary by Jacklin.

A. Summary Judgment.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts

and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

Where, as here, both parties file motions for summary judgment relying on the same facts, issues and theories, the judge, as trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences. *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). Where both parties file motions for summary judgment relying on the same facts, issues and theories, the fact that both parties have filed summary judgment motions alone does not in itself establish that there is no genuine issue of material fact. *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 518, 650 P.2d 657, 661, n. 1. This is so because by filing a motion for summary judgment a party concedes that no genuine issue of material fact exists under the theory that he is advancing, but does not thereby concede that no issues remain in the event that his adversary seeks summary judgment upon different issues of theories. *Id.*

In any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

B. Motion for Reconsideration under I.R.C.P. 11(a)(2)(B).

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks,* 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A motion for reconsideration of an interlocutory order of the trial court may be made at any time before entry of the final judgment, but not later than fourteen days after entry of the final judgment. I.R.C.P. 11(a)(2)(B). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros,* 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

III. ANALYSIS.

A. Jacklin's Second Motion for Summary Judgment and Motion for Reconsideration.

Jacklin moves this Court for reconsideration (or alternatively summary judgment) on issues relating to its claims for declaratory relief and injunctive relief in the form of a permanent injunction. Both claims of declaratory relief and injunctive relief in essence request an order decreeing Blue Dog cease and desist from utilizing the subject property in violation of the terms of the recorded instruments binding the property. Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 2, quoting Complaint, ¶¶ 36 and 39. Jacklin argues this Court erred in determining Jacklin was not entitled to a permanent injunction under I.R.C.P. 65(e) for failure to demonstrate irreparable harm, because a party seeking permanent injunctive relief to enforce a restrictive covenant need not show that money damages will not afford adequate relief and that irreparable harm is presumed when a defendant violates a consensually-negotiated restrictive covenant burdening real property. Reply Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 5. Jacklin cites for the Court case

law from numerous jurisdictions holding that the mere breach of a restrictive covenant is sufficient for the Court to interfere by injunction. Alternatively, Jacklin points the Court to case law which discusses grants of injunctive relief for violations of restrictive covenants via balancing of the equities. Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, pp. 12-13. Jacklin argues the Court has "already held and determined why the 'balancing of the equities,' if necessary to implement the relief requested by Jacklin through a permanent injunction, favors Jacklin over the Defendants". *Id.,* p. 13.

Blue Dog argues Jacklin fails to establish any support for the proposition that a different standard applies to its request for permanent injunction than that used by the Court in its Memorandum Decision and Order and that irreparable harm must be shown for injunctive relief of any type to issue. Response to Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 5. Blue Dog also argues Jacklin cannot demonstrate irreparable harm. *Id.* Blue Dog argues Idaho, Ninth Circuit, and Supreme Court precedent all require irreparable harm and that the case law cited by Jacklin is not binding on this Court. *Id.,* p. 6. Blue Dog argues Jacklin should not be able to recover monetary damages because monetary damages were not prayed for in Jacklin's Complaint, but to the extent this Court allows Jacklin to establish damages at trial, monetary damages would suffice to return the property to the condition it was in before Blue Dog's operation and, as such, Jacklin has an adequate remedy at law and no injunction is necessary. *Id.,* pp. 9-10.

In its Memorandum Decision and Order, this Court wrote:

> Injunctive relief is granted as a matter of discretion of the trial court and an appellate court will not interfere absent a manifest abuse of discretion. *Harris,* 106 Idaho 513, 517, 681 P.2d 988, 992. The party seeking an injunction bears the burden of proving a right thereto. *Id.* Here, Jacklin

> bears the burden of proving I.R.C.P. 65(e) grounds for preliminary injunction, Jacklin must show: (1) it is entitled to the relief demanded, which consists of restraining continuance of the acts complained of, either for a limited period or perpetually; (2) the complained-of act would produce waste or great or irreparable injury to plaintiff; (3) the defendant is doing something in violation of plaintiff's rights, respecting the subject of the action and tending to render judgment ineffectual; (4) the defendant threatens to or is about to remove or dispose of its property with the intent to defraud. I.R.C.P. 65(e)(1)-(4) (subsections (5) and (6) are not applicable to this matter). Jacklin has shown an entitlement to enjoin Blue Dog from continuing its business in violation of the Agreement. Jacklin has not provided the Court (at least not at summary judgment) with evidence of waste or great injury.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 25-26. Indeed, "[t]he requirements for the issuance of a permanent injunction are 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.'" *Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d 1486, 1495 (9th Cir. 1996) (quoting *American-Arab Anti-Discrtimiantion Comm. v. Reno,* 70 F.3d 1045, 1066-67 (9th Cir. 1995)). However, Jacklin's argument on reconsideration is supported by this Court's reading of the case law and other authority cited to this Court. Although no Idaho case law addresses the matter, applicable treatises state:

> Injunctive relief is equitable in nature, and is the most commonly requested remedy in actions to enforce restrictive covenants. The remedy may take the form of an injunction restraining someone from further violation of the restrictive covenant, or an injunction directing an affirmative act, such as the removal of a structure. The court will weigh the harm which will result from granting injunctive relief against the benefit that will be gained by the injunction.
>
> Typically, injunctive relief requires that an actual and substantial injury be established, but an exception to this rule exists if a breach of a restrictive covenant is shown. This exception relieves the enforcing party from showing substantial damages or the existence of irreparable injury. Thus, the injunction does not depend upon whether the breach will cause damage, and the mere breach is sufficient to support a grant of injunctive relief. Moreover, a restriction may be enforced through injunction simply by showing that a violation is "threatened."

34 Am.Jur. 3d *Proof of Facts* § 10 (2009) (Violation of Restrictive Covenant) (citations

omitted). *See also Sandstrom v. Larsen,* 59 Haw. 491, 583 P.2d 971, 978 (Haw. 1978) (Injunctive relief is appropriate when restrictive covenants are violated); *Marshall v. Adams,* 447 S.W.2d 57 (Ky.App. 1969) (Breach of a restrictive covenant may be enjoined even absent a showing of the amount of damage in fact caused by the breach). It is clear that this Court may properly exercise its discretion in determining on reconsideration whether issuance of a permanent injunction is proper. Jacklin argues the Court has already balanced the equities in matter in Jacklin's favor. Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 13. It is also without question that this Court determined declaratory relief in the instant matter "[relates] to the fact that defendants breached the Agreement and the applicability and validity of the Agreement and Articles it incorporates." Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 24.

Not requiring proof of irreparable harm in restrictive covenant cases makes sense in a variety of ways. **First** of all, the landowner would only put into place restrictive covenants that are important to the landowner. The landowner would only place restrictive covenants in the lease if the landowner felt at the time the covenants were created, that if the restrictive covenants were ever violated in the future, the landowner would be harmed. In essence, the landowner has determined in advance that violation of the restrictive covenant will cause the landowner harm. This would be true whether or not damages for that harm were easily determined. It may well be that a landowner would put a restrictive covenant in place, which happened to be important to the landowner, for which a violation would cause absolutely no economic harm or monetary damage, yet, obviously disturb the landowner. **Second**, the lessee (or purchaser of property subject to a restrictive covenant) is on notice of the restrictive

covenant when the lessee chooses to enter into the lease agreement. This was noted by the Supreme Court of South Carolina in *Houck v. Rivers,* 450 S.E.2d 106 (So.Car. 1994): "While it is true that the awarding of an injunction is addressed to the conscience of the Court, this rule is not applicable where it clearly appears that an injunction is necessary to prevent one from violating the equitable rights of another where he has notice, actual or constructive, of such rights." *Citing Sprouse v. Winston,* 232 S.C. 176, 46 S.E.2d 874 (1948); 43A C.J.S. Injunctions § 100 (1978). **Third**, as pointed out by Jacklin's counsel at oral argument, a contrary ruling would leave the landowner with a lessee (or subsequent purchaser) who has entered into a lease (or purchase), with full notice and knowledge of this consensual restrictive covenant, who may later breach that restrictive covenant if the lessee or subsequent purchaser feels the landowner will have difficulty proving damages for his lost business. Any restrictive covenant for which damages would be difficult to prove would be worthless and impossible to enforce.

One of the cases cited by Blue Dog is *Holmes Harbor Water Co., Inc. v. Page,* 8 Wn.App. 600, 508 P.2d 628 (1973). Citing *Holmes Harbor*, Blue Dog claims: "Washington courts require a showing of necessity and irreparable injury to be proven in restrictive covenant cases." Response to Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 7. As pointed out by Jacklin, this simply is not true. Reply Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment and (2) Motion for Reconsideration, p. 8. *Holmes Harbor* is a case where plaintiffs sought to enforce restrictive covenants regarding the height of structures built within a plat. The court declined to grant the injunction, holding:

> The principal question of law raised by this dispute is whether plaintiff is entitled to a mandatory injunction. No plaintiff is entitled to such an

> injunction as of course, merely because of a violation of a covenant affecting real property, for which, to be sure, there is no adequate remedy at law. The allowance of injunctive relief is a discretionary matter, in that the Court may be called upon to give or withhold relief depending upon variables, namely, the circumstances of the case.

508 P.2d 628, 631-32. In particular, the circumstances found by the court were:

> The landowner acted innocently; he attempted to comply with the restrictive covenants; and his violation of it was unintentional. The plaintiffs delayed bringing suit until the construction was complete; *they failed to prove any injury*; and the cost of removing the violation was exorbitant when compared with the slight violation of the covenant.

508 P. 2d 628, 632. (emphasis added). In no way does the italicized portion state, as Blue Dog argues: "Washington courts require a showing of necessity and irreparable injury to be proven in restrictive covenant cases." Response to Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 7. The facts of that case were Holmes Harbor failed to prove injury, but the holding of that case is not that irreparable injury is ***required*** in restrictive covenant cases. Irreparable injury is certainly a factor in such cases. The holding of *Holmes Harbor* is that just because a party violates a restrictive covenant, does not mean that injunctive relief will necessarily be granted...it depends on the facts. The facts in this case are quite different from those found in *Holmes Harbor*. Blue Dog did not act "innocently", as the violating party in *Holmes Harbor* did. This Court has already found Blue Dog "simply started its business on KLP's property without asking for approval from anyone", "Blue Dog is already in violation of the Agreement, through only its own fault". Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 16. Similarly, Blue Dog has not "attempted to comply with the restrictive covenants" such as the offending party in *Holmes Harbor.* Blue Dog's violation of the restrictive covenants in this case *was* intentional, unlike the offending party in *Holmes Harbor,* whose conduct was

unintentional. In *Holmes Harbor* the height restriction was violated by either four inches or 2.6 feet, depending from where on the property the height was measured, thus supporting the court's conclusion that: "...the cost of removing the violation was exorbitant when compared with the slight violation of the covenant." In the present case, there is nothing Blue Dog would need to tear down and rebuild. In fact, it is the *lack* of building the conforming accoutrements required by the restrictive covenants which is the cause of this litigation.

As noted by Jacklin (Reply Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment and (2) Motion for Reconsideration, p. 10), the Washington Court of Appeals case of *W.F. Hagemann v. Worth,* 56 Wn.App. 85, 782 P.2d 1072 (1989), has clearly held:

> In Washington, owners of land have an equitable right to enforce covenants by means of a general building scheme designed to make it more attractive for residential purposes, without showing substantial damage from the violation.

782 P.2d 1072, 1974.

This Court agrees with Jacklin's argument that the "irreparable harm" requirement is inapplicable regarding a prayer for injunctive relief where a breach of a restrictive covenant is alleged. Thus, it is proper for this Court to grant the injunctive relief sought by Jacklin. This is also the case if the Court were to balance the equities in determining Jacklin's entitlement to a permanent injunction.

In its Memorandum Decision, this Court noted that a grant of a permanent injunction would result in Jacklin receiving the principal relief sought without having to bring the cause to trial. Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 27. Jacklin argues the case law cited by Blue Dog at page ten of their Response to Plaintiff's (1) Second Motion for Summary Judgment; and (2)

Motion for Reconsideration, is inapposite as it deals with preliminary injunctions and temporary restraining orders, not permanent injunctive relief. Reply Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration, p. 12. Jacklin states it is entitled to the permanent injunction and "[t]he request for permanent injunctive relief, if granted, will end the case", and "There is no necessity of a trial to establish the likelihood of damages or any irreparable harm given that irreparable harm and damages are unnecessary under the great weight of authority when consensually-negotiated covenants are at issue." *Id.*

Although Idaho case law on the matter does indeed focus on preliminary injunctions, the Idaho Supreme Court has stated:

> The rule against granting a preliminary injunction which will have the effect of giving to the party seeking the injunction all the relief sought in the action, does not preclude the granting of such an injunction in a proper case. Rather, it is to be understood as requiring the moving party in such case to show a clear right to the relief sought.

Farm Service, Inc. v. U.S. Steel Corp., 90 Idaho 570, 586, 414 P.2d 898, 906-07 (1966). As discussed *supra,* Jacklin bears the burden of proving I.R.C.P. 65(e) grounds for preliminary injunction. Jacklin must show: it is entitled to the relief demanded, which consists of retraining continuance of the acts complained of, either for a limited period or perpetually; the complained-of act would produce waste or great or irreparable injury to plaintiff; the defendant is doing something in violation of plaintiff's rights, respecting the subject of the action and tending to render judgment ineffectual; the defendant threatens to or is about to remove or dispose of its property with the intent to defraud. I.R.C.P. 65(e)(1)-(4) (subsections (5) and (6) are not applicable to this matter). With the "great waste or irreparable injury" requirement taken out of the analysis for the purposes of Jacklin's request for a permanent injunction to enforce the restrictive covenant, Jacklin would only need to demonstrate its entitlement to the relief sought

and Blue Dog's violation of Jacklin's rights. This Court held at summary judgment that the Agreement is enforceable against Defendants and Defendants have violated the Agreement. Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 27-28. Therefore, Jacklin has already shown a clear right to the relief sought, and despite this Court's granting a permanent injunction giving Jacklin all relief sought, such relief is not barred outright by the Idaho Supreme Court.

As noted by Jacklin (Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment and (2) Motion for Reconsideration, p. 7), this Court erred at page twenty-seven of its decision when it wrote: "Jacklin has not provided this Court with evidence at this time entitling it to enjoin Blue Dog's continued business on the subject property pursuant to IRCP 65(e)." The conditions of I.R.C.P. 65(e) are applied to requests for preliminary injunctive relief, not requests for permanent injunctive relief such as the present case. It is important for this Court to recognize this mistake, because Blue Dog in essence has made the rather conclusory argument that just because this Court has decided a certain way previously means Blue Dog wins on reconsideration. Blue Dog argues: "The Court already determined as a matter of law that in order for an injunction to issue in this case, Jacklin must present evidence of waste or irreparable injury pursuant to I.R.C.P. 65(e). See *Memorandum Decision and Order on Cross-Motions for Summary Judgment* (Decision and Order"), p. 25."; and "As set forth in *Defendants' Response to Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration,* the Court correctly applied the standard set forth in I.R.C.P. 65(e) to determine that an injunction could not issue at the summary judgment stage of this case, and that in order for an injunction to issue, Jacklin must present evidence of great or irreparable injury." Reply Memorandum in Support of Defendants' Motion for Reconsideration, p. 2. This Court got it wrong in

citing I.R.C.P. 65(e). Blue Dog's argument that this Court got it right is: "Although Jacklin continues to couch this motion as one for a permanent injunction, it is in fact a motion for a preliminary injunction because there has not been a trial in this matter." *Id.*, p. 4. Blue Dog has cited no authority that the only distinguishing feature between a preliminary injunction and a permanent injunction, is a trial.

This confusion between preliminary injunctions and permanent injunctions also explains why Blue Dog's reliance on *Fox Farm Estates Landowners Assoc. v. Kreisch,* 285 Mont. 264, 947 P.2d 79 (1997), is misplaced.

While the facts of this case have not changed, this Court has been given new information in the form of overwhelming case law which provides the basis for this Court to overturn this Court's previous ruling. *Jordan v. Beeks,* 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

B. Blue Dog's Motion for Reconsideration.

Blue Dog moves this Court to reconsider its decision to reserve the issue of irreparable injury and/or damages for trial, arguing that Jacklin cannot show any evidence of irreparable harm. Memorandum in Support of Defendants' Motion for Reconsideration, p. 2. Blue Dog also urges the Court to determine as a matter of law that Jacklin would not be entitled to money damages at trial due to its failure to request damages in its complaint and put Blue Dog notice. *Id.*

Blue Dog argues Jacklin must demonstrate it would suffer waste or irreparable injury for an injunction to issue, and that Jacklin was unable to do so at summary judgment. *Id.*, pp. 5-6. Further, Blue Dog argues Jacklin is bound to the testimony of its I.R.C.P. 30(b)(6) designee, which at summary judgment this Court found to be speculative as to injury to Jacklin, and cannot now offer testimony contrary to the

designee's prior testimony. *Id.*, p. 6. Blue Dog also argues Jacklin has not timely designated or disclosed any expert witnesses and should therefore be barred from presenting any experts who would contradict the testimony of Jacklin's I.R.C.P. 30(b)(6) designee. *Id.*, pp. 8-9. Finally, Blue Dog argues Jacklin did not request money damages in its Complaint and, if Jacklin is able to establish damages, it should nonetheless not be entitled to recover any money damages as the Complaint seeks only declaratory and injunctive relief. *Id.*, pp. 10-11.

In response to Blue Dog's argument that no expert has been disclosed, Jacklin clarifies that its I.R.C.P. 30(b)(6) designee would provide any necessary testimony on damages and irreparable harm. Memorandum in Opposition to Defendants' Motion for Reconsideration, p. 8. Jacklin states the designee advised Blue Dog in his deposition testimony that he is the expert on whether or not Blue Dog's operations would cause Jacklin to lose tenants or forego land sales and that, as an agent of the owner of the property, the designee is competent to testify about damages. *Id.*, pp. 8-9. It is likely that Blue Dog's concerns about Jacklin offering testimony contradicting the I.R.C.P. 30(b)(6) designee's deposition testimony are unfounded given Jacklin's reply that if any testimony on irreparable harm is necessary, it will come from Mr. Stoesser, Jacklin's I.R.C.P. 30(b)(6) designee.

Jacklin replies to Blue Dog's argument that the failure to request damages in its Complaint bars Jacklin from entitlement to recover damages by stating, again, that damages are not required to entitle a party to injunctive relief in enforcing a restrictive covenant. Memorandum in Opposition to Defendants' Motion for Reconsideration, p. 9. Jacklin also argues "damages or irreparable harm, to the extent necessary, may be proven as an element of the request for permanent injunctive relief without a concurrent

request for an award of damages under a breach of contract claim." *Id.*, p. 10. In this regard, Jacklin's argument is well-taken. The Complaint states a claim for injunctive relief, which by its very nature generally requires a moving party to prove damage; thus, it is unlikely that Defendants would be caught off guard or otherwise prejudiced if this Court required Jacklin to set forth evidence of irreparable harm (in the form of a monetary damage amount) at trial on this matter.

For the reasons discussed above, this Court finds as a matter of law that Jacklin need not establish great waste, irreparable injury, or an inadequate remedy at law in order to receive the permanent injunction it seeks here.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court exercises its discretion and grants Jacklin's motion for reconsideration/summary judgment, finding as a matter of law that no irreparable harm need be shown when issuing a permanent injunction to enforce a restrictive covenant. Because no such showing need be made, this Court denies Blue Dog's motion for reconsideration (asking the Court to hold as a matter of law that Jacklin cannot make any showing of irreparable injury and to determine as a matter of law that Jacklin cannot recover damages).

IT IS HEREBY ORDERED plaintiff Jacklin's Motion for Reconsideration is GRANTED, plaintiff Jacklin's Second Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED defendants' Motion for Reconsideration is DENIED.

Entered this 14th day of September, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 14 day of September, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
John Magnuson	Faxed	Michael Hines	509-747-2323

Secretary

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

2009 OCT 19 AM 10: 25

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

vs.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

CASE NO. CV-08-6752

JUDGMENT

THE COURT, having previously entered its June 15, 2009 "Memorandum Decision and Order on Cross-Motions for Summary Judgment" and its September 14, 2009 "Memorandum Decision and Order Granting Plaintiff's Motion for Reconsideration, Granting Plaintiff's Second Motion for Summary Judgment, and Denying Defendants' Motion for Reconsideration," HEREBY

jrm 10/19/09

and after reviewing the proposed judgment submitted by plaintiff on October 2, 2009, and by defendants on October 13, 200

ENTERS this final Judgment in accordance with IRCP 58(a) and 65(d).

FINDINGS

The Court's June 15, 2009 Order and September 14, 2009 Order made the following findings which are restated herein:

1. The subject property as defined herein is legally described as Lots 1-4, Block 1, Riverbend Commercial Park Phase I, according to the plat recorded in the office of the County Recorder in Book F of Plats at page 224, records of Kootenai County, Idaho. Said property is referred to herein as "the subject property."

2. On November 7, 1990, Plaintiff Jacklin Land Company (hereafter "Jacklin") and Quality Centers Associates impressed upon the subject property certain specific covenants through an agreement recorded as Kootenai County Instrument No. 1200512. That Agreement is referred to herein as "the subject Agreement."

3. Quality Centers Associates is the predecessor-in-interest to the "Ownership Defendants," a term defined to include those Defendants who own title to the subject property (who consist of all Defendants named herein other than Blue Dog RV, Inc.).

4. The subject Agreement specifically incorporated as additional covenants burdening the subject property Articles 2 through 6 of the following instruments of record in Kootenai County:

INSTRUMENT NO.	RECORDATION DATE
1135200	November 28, 1988
1155659	July 26, 1989
1155779	July 27, 1989

Said instruments, as described above, are referred to herein as "the CC&Rs."

5. On July 1, 2008, the Ownership Defendants leased the subject property to Defendant Blue Dog RV, Inc. which has thereafter utilized the subject property for purposes of a commercial recreational vehicle (RV) sales business.

6. Any use of the subject property by the Ownership Defendants and/or Defendant Blue Dog RV, Inc. is subject to the terms of the subject Agreement and the CC&Rs.

7. The subject Agreement limits the Defendants' use of the subject property as follows: it binds Defendants to construct and maintain a first-class shopping center, it binds the Defendants to work with Jacklin to achieve a mutually acceptable design and appearance for the shopping center, and it binds Defendants to conform to Articles 2, 3, 4, 5, and 6 of the CC&Rs last amended through Kootenai County Instrument No. 1155779.

8. The Court finds as a matter of law that there is no ambiguity that Blue Dog's RV Sales lot is not a "shopping center" within the meaning of the subject agreement. Accordingly, the Court finds that part "i" of the subject Agreement has been violated by Blue Dog's current use of the subject property.

9. The Court further finds that there was no effort on the part of Defendant Blue Dog or the Ownership Defendants, prior to implementing the uses to which the property has currently been put by Blue Dog, to "work together with Seller [Jacklin] to achieve a mutually acceptable design and appearance for the shopping center so that it shall be aesthetically pleasing and compatible with other uses within Riverbend Commerce Park." Accordingly, the Court finds that part "ii" of the subject agreement has been violated by the Ownership Defendants and Defendant Blue Dog.

10. The Court further finds that Defendant Blue Dog and the Ownership Defendants, through their current use, have violated part "iii" of the subject Agreement by failing to comply with the requirements of Articles 3 of the CC&Rs. Specifically, Defendant Blue Dog and the Ownership Defendants have failed to comply with the requirements of Article 3.2 (landscaping), 3.4 (asphalt or concrete parking areas), and 3.5 through 3.8 (requirements pertaining to lighting, access, and striping and the necessity for submitting a prior request to Jacklin for approval of any proposed parking plan).

11. The Court finds that Defendant Blue Dog and the Ownership Defendants, through their current use, have violated part "iii" of the subject Agreement by failing to comply with Article 4 of the CC&Rs (setting forth signage requirements including design, appearance, and prior approval by Jacklin).

12. Based upon the record upon the parties' Cross-Motions for Summary Judgment, it appeared to the Court that material issues of fact precluded summary judgment for either party as to the issue of whether or not Defendant Blue Dog or the Ownership Defendants had violated Articles 2, 5, and/or 6 of the CC&Rs. However, given the violations that do exist, as determined by the Court on summary judgment, the issue of whether or not there are additional violations under Articles 2, 5, and/or 6 of the CC&Rs is moot for purposes of granting the relief requested by Jacklin and awarded hereunder.

PERMANENT INJUNCTION.

Based upon the foregoing findings, and pursuant to IRCP 65(d) and IRCP 58, the Court HEREBY ENTERS JUDGMENT in favor of Jacklin and against Defendant Blue Dog RV, Inc. and the Ownership Defendants as follows:

1. Jacklin's Complaint alternatively seeks injunctive relief under Jacklin's claim for a permanent injunction and under Jacklin's claim pursuant to the Uniform Declaratory Judgments Act, I.C. §10-1201, et seq. Jacklin seeks prospective declaratory and injunctive relief ordering that Defendants' use of the subject property comply with the terms of the subject agreement and Articles 3 and 4 of the CC&Rs as have been determined to apply by the Court.

2. The current use of the subject property by Defendant Blue Dog, under lease from the Ownership Defendants, violates parts "i," "ii," and "iii" of the subject Agreement and Articles 3 and 4 of the CC&Rs incorporated into part "iii" of the subject Agreement.

3. Defendants and each of them, and any and all persons or parties claiming from or under or by Defendants, with respect to the subject property, are HEREBY ORDERED to cease and desist from using the subject property for the storage and/or parking of RVs by October 25, 2009 at 5:00 p.m. Defendant shall take any and all action necessary to timely comply with the terms of this Order.

4. From and after compliance with the terms of Paragraph 3 above, Defendants and each of them and any and all persons or parties claiming by, through, or under Defendants are permanently enjoined from hereafter utilizing the subject property or any portion thereof in any manner that does not otherwise comply with the substance and procedures contained in the subject Agreement and Articles 2-6 of the CC&Rs incorporated therein.

5. This Court shall retain jurisdiction, under IAR 13(b)(10) and (13), to enforce the terms of this Judgment during the pendency of any appeal which either or both of the Defendants may hereafter file from this Judgment.

6. This Judgment is a final judgment for purposes of IRCP 58.

7. Any request of award for costs or attorney fees shall be determined by supplemental order and judgment consistent with the procedures set forth in IRCP 54(d), and (e).

IT IS SO ORDERED.

ENTERED this 19th day of October, 2009.

JOHN T. MITCHELL
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of October, 2009, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael J. Hines Michael Schmidt Lukins & Annis, P.S. 1600 Washington Trust Financial Center 717 W. Sprague Avenue Spokane, WA 99201-0466	____ US Mail ____ Overnight Mail ____ Hand Delivered __X__ Facsimile **FAX: 509/747-2323** ✓
John F. Magnuson Attorney at Law P.O. Box 2350 1250 Northwood Center Court, Suite A Coeur d'Alene, ID 83814	____ US Mail ____ Overnight Mail ____ Hand Delivered __X__ Facsimile **FAX: 208\667-0500** ✓

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: 872382
2009 OCT 23 PM 2:18
CLERK DISTRICT COURT
DEPUTY

MICHAEL J. HINES
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Attorneys for Defendants / Appellants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Respondent/Plaintiff,

v.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Appellants/Defendants.

NO. CV-08-6752

DEFENDANTS' NOTICE OF APPEAL

Fee Category:	L.4
Fee:	$86.00
	$15.00
	$101.00

ORIGINAL

TO: THE ABOVE-NAMED PLAINTIFF: JACKLIN LAND COMPANY, an Idaho limited partnership; AND ITS ATTORNEYS OF RECORD JOHN F. MAGNUSON.

NOTICE IS HEREBY GIVEN THAT:

1. The Appellants to this action are: BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife. Michael J. Hines and Michael G. Schmidt of Lukins & Annis, P.S. are the attorneys for the appealing parties. The above-named Appellants appeal against the following party: JACKLIN LAND COMPANY, an Idaho limited partnership. John F. Magnuson is the attorney for said party.

2. The above-named Appellants appeal to the Idaho Supreme Court from the following Judgment(s), order(s), or finding(s) in favor of the Plaintiff, JACKLIN LAND COMPANY, by the Honorable John T. Mitchell, presiding:

(a) Judgment entered on October 19, 2009, on behalf of JACKLIN LAND COMPANY.

(b) Memorandum Decision and Order Granting Plaintiff's Second Motion for Summary Judgment, Denying Defendants' Motion for Reconsideration entered on September 14, 2009.

(c) Memorandum Decision and Order on Cross-Motions for Summary Judgment entered on June 15, 2009.

3. The above-named Appellants have a right to appeal to the Idaho Supreme Court, and the Judgment, Decisions, and Orders described in paragraph 2 above are appealable under the Idaho Appellate Rules, including but not limited to, Idaho Appellate Rule 11(a)(1) and 11(a)(3).

4. A preliminary statement of the issues on appeal which the above-named Appellants intend to assert in the appeal, provided such list of issues on appeal shall not prevent the Appellants from asserting other issues on appeal, include, but are not limited to, the following:

(a) Whether the trial court erred in granting plaintiff's motion for summary judgment and ordering that the 1990 QCA/Jacklin Agreement (the "Agreement") is enforceable against the defendants.

(b) Whether the trial court erred in granting plaintiff's motion for summary judgment and ordering that the Agreement is a "use" agreement and not a "development" agreement.

(c) Whether the trial court erred in granting plaintiff's motion for summary judgment and ordering that Articles 2, 3, 4, 5, and 6 of the Declaration of Covenants, Conditions, and Restrictions apply to defendants.

(d) Whether the trial court erred in granting plaintiff's motion for summary judgment ordering that defendants have violated the Agreement.

(e) Whether the trial court erred in denying defendants' cross-motion for summary judgment seeking to dismiss plaintiff's complaint.

(f) Whether the trial court erred in denying defendants' cross-motion for summary judgment, given defendants' argument that under contract construction standards governing the interpretation and enforceability of restrictive covenants, including the requirement that all ambiguities are to be interpreted in favor of the free use of land, the Agreement does not expressly or by implication prohibit defendant Blue Dog's RV operation.

(g) Whether the trial court erred in denying defendants' cross-motion for summary judgment, given defendants' argument that plaintiff's refusal to work with defendants to address Blue Dog's RV operation and any site concerns constitutes a breach of the Agreement and the implied covenant of good faith and fair dealing, which bars plaintiff from asserting claims against defendants under the Agreement.

(h) Whether the trial court erred in denying defendants' cross-motion for summary judgment, given defendants' argument that defendants' affirmative defenses of waiver and estoppel, based upon plaintiff's inequitable reversal of its position as to whether Blue Dog's RV shopping center was a permitted operation in the commerce park, bars plaintiff's request for injunctive relief.

(i) Whether the trial court erred in issuing a permanent injunction and ordering defendants to cease and desist from using the subject property for the storage and/or parking of RVs, when there is no evidence that plaintiff has suffered any damages or irreparable injury.

(j) Whether the trial court erred in granting plaintiff's motion for reconsideration and second motion for summary judgment finding that, as a matter of law, no irreparable harm need be shown when issuing a permanent injunction to enforce a restrictive covenant.

(k) Whether the trial court erred in denying defendants' motion for reconsideration, which asked the court to order that plaintiff is not entitled to injunctive relief because it failed to show any irreparable injury as a result of any breach of the Agreement.

(l) Whether the trial court erred in denying defendants' motion for reconsideration, which asked the court to order that plaintiff is not entitled to injunctive relief

because it failed to show that any damages it suffered could not be adequately compensated by a monetary award.

(m) Whether the trial court erred in denying defendants' motion for reconsideration, which asked the court to find that plaintiff has suffered no damages or injury.

5. Has an order been entered sealing all or any portion of the record? No.

6. Is any additional reporter's transcript requested? No.

7. The Appellants request the following Documents to be included in the clerk's record in addition to those automatically included under Idaho Appellate Rule 28:

No.	DOCUMENT TITLE	FILED/ENTERED
1.	New Case Filed – Other Claims Filing: A – Civil Complaint for more than $1,000.00	08/22/2008
2.	Defendants' Answer	09/29/2008
3.	Motion For Summary Judgment	12/11/2008
4.	Affidavit of Pat Leffel RE: Motion for Summary Judgment	12/11/2008
5.	Affidavit of John Magnuson RE: Motion for Summary Judgment	12/11/2008
6.	Affidavit of Tom Stoeser RE: Motion for Summary Judgment	12/11/2008
7.	Memorandum in Support of Motion for Summary Judgment	12/11/2008
8.	Plaintiff's Statement of Undisputed Material Facts RE: Motion for Summary Judgment	12/11/2008
9.	Affidavit of Michael J. Hines	02/17/2009
10.	Affidavit of Dave Russell	02/17/2009

11.	Affidavit of Richard A. Cordes	02/17/2009
12.	Defendants' Cross-Motion for Summary Judgment	02/17/2009
13.	Defendants' Statement of Undisputed Material Facts in Support of Defendants' Cross-Motion for Summary Judgment & in Opposition to Plaintiff's Motion for Summary Judgment	02/17/2009
14.	Memorandum in Support of Defendants' Cross-Motion for Summary Judgment & in Opposition to Plaintiff's Motion for Summary Judgment	02/17/2009
15.	Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment	02/25/2009
16.	Reply Affidavit of Michael J. Hines	03/02/2009
17.	Defendants' Reply Memorandum (1) to Plaintiff's Objection to and Motion to Strike Defendants' Cross-Motion for Summary Judgment, (2) to Plaintiff's Motion to Supplement the Record, and (3) in Support of Defendants' Cross-Motion for Summary Judgment	03/02/2009
18.	Supplemental Citation of Authority By Plaintiff	03/31/2009
19.	Memorandum Decision and Order on Cross-Motions for Summary Judgment	06/15/2009
20.	Plaintiff's Motion for Reconsideration	07/13/2009
21.	Plaintiff's Second Motion for Summary Judgment	07132009
22.	Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration	07/13/2009
23.	Defendants' Motion for Reconsideration	07/27/2009
24.	Affidavit of Michael J. Hines in Support of Defendants' Motion for Reconsideration	07/27/2009
25.	Response to Plaintiff's Second Motion for Summary Judgment & Motion for Reconsideration	07/27/2009

26.	Memorandum in Support of Defendants' Motion for Reconsideration	07/27/2009
27.	Reply Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration	08/06/2009
28.	Memorandum in Opposition to Defendants' Motion for Reconsideration	08/06/2009
29.	Reply Memorandum in Support of Defendants' Motion for Reconsideration	08/07/2009
30.	Memorandum Decision and Order Granting Plaintiff's Motion for Reconsideration, Granting Plaintiff's Second Motion for Summary Judgment, and Denying Defendant's Motion for Reconsideration	09/14/2009
31.	Judgment	10/19/2009

8. The Appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court. None.

9. The Appellants request an award of attorney fees under Idaho Appellate Rules 35, 40, and 41, and on all bases stated in their Complaint, including but not limited to I.C. §§ 12-120, 12-121, and the terms of the parties' contract.

10. I certify:

(a) That a copy of this Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and Address: None.

(b) That the estimated fee of $100.00 for the preparation of the clerk's record has been paid.

(c) That the estimated fee of $0.00 for the preparation of the reporter's transcript has been paid.

(d) That the appellate filing fee of $101.00 has been paid.

(e) That service has been made upon all the parties required to be served pursuant to Idaho Appellate Rule 20.

DATED this 23rd day of October, 2009.

LUKINS & ANNIS, P.S.

By _____
MICHAEL J. HINES
MICHAEL G. SCHMIDT
Attorneys for Appellants/Defendants

CERTIFICATE OF SERVICE
PER IDAHO APPELLATE RULE 20

I HEREBY CERTIFY that on the 23rd day of October, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

JOHN F. MAGNUSON
1250 Northwood Center Ct.
P.O. Box 2350
Couer d'Alene, ID 83814

- ☐ U.S. Mail
- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX)

Michael G. Schmidt

STATE OF IDAHO)
COUNTY OF KOOTENAI) ss
FILED:

2009 OCT 23 PM 2:18

CLERK DISTRICT COURT
Susan Reed
DEPUTY

MICHAEL J. HINES
ISB #6876
MICHAEL G. SCHMIDT
ISB #6911
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Facsimile: (509) 747-2323

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY,

Plaintiff,

v.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

NO. CV-08-6752

AFFIDAVIT OF REBECCA ASPLUND

ORIGINAL

STATE OF WASHINGTON)
: ss
County of Spokane)

REBECCA ASPLUND, being first duly sworn on oath, deposes and says:

1. I am over the age of 18 years, of sound mind, and am competent to testify in this matter. I make this Affidavit based upon my own personal knowledge and/or belief.

2. I currently reside in Spokane County, Washington.

3. My husband and I own Blue Dog RV, Inc. ("Blue Dog"). Blue Dog is a local, family-owned Idaho corporation and business. Blue Dog owns and operates an RV shopping center currently located in Post Falls, Idaho on property we lease from KLP. We have operated Blue Dog for approximately two years. We currently have a significant number of RV units on site which is part of and adjacent to the Post Falls Outlet Mall.

4. I am aware that the Court has issued an Order directing us to cease our current operations at our Post Falls location. We have been attempting to find an alternative site to relocate Blue Dog's operations since June 2009. Unfortunately, we have yet to locate an acceptable alternative site. In anticipation of finding an alternative site, we have also applied for a construction loan, given the likelihood that an acceptable alternative site would require construction to meet our needs. We anticipate being approved for a construction loan in January 2010. It is our goal and hope that we would be able to fully vacate our current site and relocate Blue Dog's operations by June 2010.

5. I believe that if we are forced to close our operation immediately and before we are able to find an alternative site, this will likely cause us to file bankruptcy in a matter of months. We would lose approximately $500,000 gross of revenues per month. We would have RV inventory which we could not sell which would then cause us to default on bank loans. I believe it would also cause us to permanently lose customers even if we were able to operate again.

6. Forcing us to immediately vacate the premises and cease our operations would cause us irreparable harm and financial ruin.

7. We are attempting to relocate as soon as possible, and we ask the Court to give us a reasonable time period to accomplish that goal.

REBECCA ASPLUND

SUBSCRIBED AND SWORN TO before me this 22 day of October, 2009.

Notary Public (Signature)

DALLAS SMITH
Notary Public
State of Idaho

Dallas Smith
(Print Name)

My appointment expires 3.19.2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2009, a true and correct copy of the foregoing document was served upon the following, as indicated below and addressed as follows:

JOHN F. MAGNUSON
1250 Northwood Center Ct.
P.O. Box 2350
Couer d'Alene, ID 83814

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~~LINDA WARNOCK~~
Michael Schmidt

STATE OF IDAHO)
COUNTY OF KOOTENAI) SS
FILED:

2009 OCT 23 PM 2:18

CLERK DISTRICT COURT
DEPUTY

MICHAEL J. HINES
ISB#6876
MICHAEL SCHMIDT
ISB# 6911
LUKINS & ANNIS, P.S.
1600 Washington Trust Financial Center
717 W Sprague Ave
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY,

Plaintiff,

v.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

NO. CV08-6752

MEMORANDUM IN SUPPORT OF MOTION TO STAY INJUNCTION PENDING APPEAL

ORIGINAL

I. INTRODUCTION

Following motions for summary judgment reconsideration filed by both parties, this Court ultimately awarded Plaintiff's request for permanent injunctive relief and enforcement of the restrictive covenants at issue in this case.

Defendants, including Blue Dog RV, Inc., ("Blue Dog"), have filed a Notice of Appeal on the injunctive relief ordered by this Court, and now move this Court for a stay of the injunctive relief pending trial, per I.R.C.P. 62(c). Defendant Blue Dog will suffer financial ruin and irreparable economic harm if the injunction is not stayed pending the appeal. Moreover, because Plaintiff has never pointed to any damages as a result of Defendants' alleged violation of the restrictive covenants at issue in this case, Plaintiff will not suffer harm if the injunction is stayed, nor is a monetary bond appropriate or necessary to secure the stay. Given these issues, the balance of equities favors a stay of the injunction. Defendants respectfully request that the Court grant its Motion to Stay the Injunction Pending Appeal.

II. ARGUMENT

A. This Court Should Exercise Its Discretion to Grant a Stay of Injunctive Relief Pending Appeal.

Under I.R.C.P. 62(c), when an appeal is taken from a final judgment granting an injunction, the court may suspend the injunction during the pendency of the appeal upon such terms as it considers proper for the security of the rights of the adverse party. This security may be provided by bond "or otherwise." I.R.C.P. 62(c). "Rule 62(c) codifies the inherent power of the courts to make whatever order is deemed necessary to preserve the status quo and to ensure the effectiveness of the eventual judgment." *Knutson v. AG Processing, Inc.*, 302 F.Supp.2d 1023 (2004) (interpreting the identical Federal Rule of Civil Procedure 62(c)). Here,

the balance of equities favors issuance of a stay of the injunctive relief ordered by the Court, pending the outcome of the appeal filed concurrently with this Motion.

A party seeking a stay must show irreparable harm is certain and great and that there is a clear and present need for equitable relief. *Id.* at 1037; *see also Ashland Oil, Inc. v. FTC,* 409 F.Supp. 297, 307 (D.D.C 1976). The threat of "unrecoverable economic loss" amounts to irreparable harm. *Id.* Economic loss may represent irreparable injury where the loss "threatens the existence of the movant's business." *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 n. 2 (D.C. Cir. 1977); *Varicon Int'l v. Office of Personnel Management,* 934 F.Supp. 440, 447 (D.C. Cir. 1996).

Here, Blue Dog will suffer significant and irreparable injury in the absence of a stay of the injunction. At this time, Blue Dog has no alternative relocation site prospects. *Affidavit of Rebecca Asplund* at ¶ 4. It has been looking for a new site since June, 2009 without success. Effectively, enforcement of this injunction will put an end to Blue Dog's operations for an undetermined amount of time. *Id.* Blue Dog will face the loss of significant revenue, approximately $300,000 a month, and the loss of customers during this undetermined time of displacement. Blue Dog has a significant amount of inventory and reasonably believes the situation would force them into default and to seek bankruptcy relief. *Id.* at ¶ 5. Blue Dog faces certain economic ruin if the injunction is not stayed pending appeal.

Moreover, this significant injury would come at the expense of a decision that was, respectfully, a close call and is now the subject of an appeal. As the Court has recognized, there is no Idaho authority on-point as to the issue of whether a plaintiff must demonstrate damages in order to obtain the injunctive relief sought in this case. Moreover, there is – at best

– a split of authority on this issue in the rest of the country. *See Memorandum Decision & Order Granting Plaintiff's Motion for Reconsideration & Granting Plaintiff's Second Motion for Summary Judgment & Denying Defendants' Motion for Reconsideration.* Respectfully, the outcome of the appeal on this issue is not certain under the circumstances.

Finally, as recognized by the Court, Plaintiff has not shown that it will suffer any injury in the absence of an injunction. The Court has stated that any damage suffered by Plaintiff would be "speculative" in that Plaintiff has not identified that any tenants have left, thought about leaving, or decided not to rent land due to Blue Dog's presence and purported violation of the Agreement. Plaintiff has not provided this Court with evidence of waste or injury. *Memorandum Decision & Order on Cross-Motions for Summary Judgment.*

The balance of these equitable issues tips strongly in Blue Dog's favor. This Court should exercise its discretion under I.R.C.P. 62(c) to stay enforcement of the injunction pending appeal.

B. <u>If the Court Grants a Stay of Injunctive Relief Pending Appeal, a Bond is Not Required Nor Appropriate.</u>

I.R.C.P. 62(c) does not have a mandatory bond requirement in the event enforcement of an injunction is stayed pending appeal. Rather, the Court has the discretion to condition the stay on "terms" it considers proper to secure the other party's rights.

As discussed, Plaintiff has failed to provide any evidence of economic harm as a result of Blue Dog's presence. As it stands, Plaintiff has failed to provide any evidence that a bond is necessary or appropriate because there is no economic harm to remedy. The lack of monetary damages precludes the need for a bond and necessarily prevents the Court from having any basis – other than pure speculation – as to the amount of an appropriate bond. Without some

objective evidence as to potential damages pending appeal and Blue Dog's inability to remedy those damages following the appeal, a bond is unnecessary. *See Avirgan v. Hull*, 125 F.R.D. 185 (D.C.Fla. 1989) (finding that a bond to secure stay pending appeal was inappropriate where a defendant's ability to pay a judgment is so plain that the cost of a bond would be a waste of money).

Moreover, because this Court retains jurisdiction over injunctions pending appeal, it is free to reevaluate the situation at a later date to maintain the status quo. *See U.S. v. El-O-Pathatic Pharmacy*, 192 F.2d 62, 79-80 (9th Cir. 1951) (noting that Rule 62(c) allows the trial court to retain jurisdiction and make orders to preserve the status quo while a case is pending in the appellate court).

C. In the Alternative, This Court Should Extend the Automatic Stay to Allow Defendants to Request a Stay at the Court of Appeals.

In the event that this Court denies Defendants' current Motion to Stay, Defendants request that the Court extend the automatic stay time-frame to allow Defendants to seek a stay in the Supreme Court, pursuant to I.A.R. 13(b). This request is based on the significant harm, as argued above, that would inevitably result from this Court's denial of a stay.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their Motion for Stay of Injunction Pending Appeal.

DATED this 23rd day of October, 2009.

LUKINS & ANNIS, P.S.

By _____
MICHAEL J. HINES / ISB # 6876
MICHAEL SCHMIDT / ISB # 6911

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2009, a true and correct copy of the foregoing document was served upon the following, as indicated below and addressed as follows:

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Mike Schmidt
~~LINDA WARNOCK~~
Michael Schmidt

STATE OF IDAHO)
COUNTY OF KOOTENAI) SS
FILED:

2009 OCT 23 PM 2:18

CLERK DISTRICT COURT
Susan Reed
DEPUTY

MICHAEL J. HINES
ISB #6876
MICHAEL G. SCHMIDT
ISB #6911
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1600 Washington Trust Financial Center
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

v.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

NO. CV-08-6752

MOTION TO STAY INJUNCTION PENDING APPEAL

ORIGINAL

COME NOW, Defendants, by and through their attorney of record, Michael J. Hines, and respectfully move the Court, pursuant to IRCP 62(c), for entry of an Order Staying Injunction Pending Appeal as set forth herein.

The *Motion to Stay Injunction Pending Appeal* is supported by the pleadings and submissions on file herein, including the following:

1. Memorandum in Support of Motion to Stay Injunction; and

2. Affidavit of Rebecca Asplund.

ORAL ARGUMENT IS REQUESTED.

RESPECTFULLY REQUESTED this 23rd day of October, 2009.

LUKINS & ANNIS, P.S.

By _____
MICHAEL J. HINES
ISB #6876
MICHAEL G. SCHMIDT
ISB #6911
Attorneys for Defendants

CERTIFICATE OF SERVICE

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

v.

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Defendants.

NO. CV-08-6752

MOTION TO SHORTEN TIME TO HEAR MOTION TO STAY INJUNCTION PENDING APPEAL

ORIGINAL

COME NOW, the Defendants, by and through their counsel of record, Lukins & Annis, P.S., and hereby move this Honorable Court for an Order Shortening Time thereby allowing the *Motion to Stay Injunction Pending Appeal* to be heard on Thursday, October 29, 2009 at 11:30 a.m. at the Kootenai County Courthouse, located in Coeur d'Alene, Idaho before the Honorable John T. Mitchell.

THIS MOTION is made pursuant to Rule 7(b)(3), I.R.C.P., and based upon the records and pleadings filed herein and such additional evidence and testimony as may be presented at the hearing upon this Motion.

ORAL ARGUMENT IS REQUESTED.

RESPECTFULLY REQUESTED this 23rd day of October, 2009.

LUKINS & ANNIS, P.S.

By _____
MICHAEL J. HINES
ISB #6876
MICHAEL G. SCHMIDT
ISB #6911
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2009, a true and correct copy of the foregoing document was served upon the following, as indicated below and addressed as follows:

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~~LINDA WARNOCK~~
Michael Schmidt

JOHN F. MAGNUSON
Attorney at Law
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1250 Northwood Center Court, Suite A
Coeur d'Alene, ID 83814
Phone: (208) 667-0100
ISB #04270

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

vs.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

CASE NO. CV-08-6752

PLAINTIFF'S OBJECTION TO DEFENDANTS' "MOTION TO STAY INJUNCTION PENDING APPEAL"

COMES NOW Plaintiff Jacklin Land Company (hereafter "Jacklin"), by and through its attorney of record, John F. Magnuson, and respectfully objects to the Defendants' "Motion to Stay Injunction Pending Appeal," filed October 23, 2009. Said Motion was also accompanied by a "Motion to Shorten Time" so as to allow for a hearing of the "Motion to Stay Injunction Pending Appeal." Plaintiff does not object to the "Motion to Shorten Time." The Plaintiff's objection to the "Motion to Stay Injunction Pending Appeal" is supported by the pleadings and submissions on file herein, including the accompanying Memorandum and Affidavit of John F. Magnuson.

DATED this 28th day of October, 2009.

JOHN F. MAGNUSON
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2009, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael J. Hines Michael Schmidt Lukins & Annis, P.S. 1600 Washington Trust Financial Center 717 W. Sprague Avenue Spokane, WA 99201-0466	__X__ US Mail ____ Overnight Mail ____ Hand Delivered __X__ Facsimile FAX: 509/747-2323

JACKLIN-BLUE DOG.OPPINJNCTMTN.wpd

JOHN F. MAGNUSON
Attorney at Law
P.O. Box 2350
1250 Northwood Center Court, Suite A
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Phone: (208) 667-0100
ISB #04270

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

vs.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

CASE NO. CV-08-6752

MEMORANDUM IN OPPOSITION TO DEFENDANTS' "MOTION TO STAY INJUNCTION PENDING APPEAL"

COMES NOW Plaintiff Jacklin Land Company (hereafter "Jacklin"), by and through its attorney of record, John F. Magnuson, and respectfully submits this Memorandum in support of its objection to the Defendants' "Motion to Stay Injunction Pending Appeal."[1] This Memorandum is supported by the pleadings and submissions on file.

I. FACTUAL BACKGROUND

Set forth below is a summary of facts which bear on the subject Motion and which are contained in the record of proceedings previously held before this Court. Record citations are indicated below.

1. On July 1, 2008, Defendant Blue Dog entered into a Lease for the subject property (as that phrase is defined in paragraph 2 below). See Magnuson Affidavit (filed December 11, 2008) at Ex. C.

2. On July 7, 2008, Dave Russell (a representative of Defendant Blue Dog) advised Pat Leffel (a representative of Plaintiff Jacklin Land Company) that Blue Dog had leased the subject property as that phrase has been defined in this litigation (Lots 1 through 4 of Block 1, Riverbend Commerce Park Phase I). See Leffel Affidavit (filed December 11, 2008) at ¶ 12.

3. On July 10, 2008, three days after Jacklin was advised by Blue Dog that it had leased the subject property, Rick Cordes (a representative of the Defendant ownership group) advised Leffel that he (Cordes) was "trying to locate a copy of the CC&Rs" and that he wasn't "aware that there

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[1]The Defendants have contemporaneously moved the Court for entry of an order shortening time to hear the "Motion to Stay Injunction Pending Appeal." Plaintiff has no objection to the "Motion to Shorten Time." Both Motions are noticed for hearing on October 29, 2009 at 11:30 a.m.

were land use restrictions requiring paving for this temporary use." See Leffel Affidavit at ¶ 14 and Ex. C.

4. Leffel responded on July 14, 2008, advising Cordes of the QCA/Jacklin Agreement of November 1990. Id. at ¶ 15. Leffel also advised Cordes that the ownership Defendants were bound by the terms of the Agreement executed by QCA, the ownership Defendants' predecessor-in-title. That Agreement required that QCA (and now the Defendants herein by succession) "use the lot solely to 'construct a first class shopping center' and for no other purposes." Id. Leffel also advised Cordes that the Defendants had failed to comply with Articles 2 through 6 of the CC&Rs, as amended through July 27, 1989, which were incorporated into the QCA/Jacklin Agreement. Id.

5. On July 14, 2008, Cordes responded to Leffel. He stated, "We [the Defendants] understand, and please accept our apologies for not knowing this information or being aware of the CC&R restrictions for this parcel. I will notify Blue Dog RV now and will make other arrangements." Id. at ¶ 16 and Ex. C.

6. On July 15, 2008, Leffel advised Cordes that Jacklin Land Company would like Blue Dog RV off the site within the next ten (10) days. Id. at ¶ 17.

7. On July 16, 2008, Cordes backtracked, claiming that the Blue Dog use was permissible. Id. at ¶ 18 and Ex. E.

8. Leffel immediately responded and directed Cordes to review the QCA/Jacklin Agreement. Id. at ¶ 19.

9. Cordes in turn responded by stating, "We are not aware of a written agreement between Jacklin Land and Quality Centers Associates. Can you please provide us with a copy of

this?" Id. at ¶ 19.

10. In actuality, when the Defendant owners had purchased the subject property (in April of 2005), they had obtained a title policy that disclosed as Exception No. 14 the QCA/Jacklin Agreement of November 7, 1990. See Magnuson Affidavit at Ex. D.

11. On July 24, 2008, the Defendant owners e-mailed Leffel and notified him that they did not believe that the 1990 QCA/Jacklin Agreement, or the CC&Rs incorporated therein, restricted the Defendants "from a land lease to a temporary use on the vacant lot." See Leffel Affidavit at ¶ 20 and Ex. G.

12. On August 5, 2008, Plaintiff, through counsel, advised Defendants that the uses to which they had put the subject property were in violation of the terms of the 1990 QCA/Jacklin Agreement and the CC&Rs incorporated therein. See Complaint at Ex. D. After addressing the applicability of the QCA/Jacklin Agreement and the CC&Rs incorporated therein, Plaintiff advised Defendants that if their use of the subject property was not terminated in full by August 12, 2008, that suit would be filed, seeking declaratory and injunctive relief "directing the immediate removal of all property of Blue Dog RV and the cessation of all operations of Blue Dog RV as the same are not in compliance with the cited instruments." Id.

13. The Defendants refused to honor Jacklin's demand and this proceeding was instituted on August 22, 2008 through the filing of the Complaint.

14. On December 11, 2008, Plaintiff filed its Motion for Summary Judgment on its claim for permanent injunctive relief. The hearing was noticed for January 8, 2009.

15. Defendants requested that the hearing be continued so as to allow for the taking of the depositions of Pat Leffel, Tom Stoeser, and a Rule 30(b)(6) designee of Jacklin Land Company.

Those depositions were taken, as requested by Defendants.

16. Defendants then cross-moved for summary judgment. The Defendants' Motion, and the Plaintiff's December 11, 2008 Motion for Summary Judgment, were heard by the Court on March 3, 2009. Jacklin's Motion sought entry of a permanent injunction, through summary judgment, directing that the Defendants and each of them cease and desist from utilizing the subject property for purposes of a commercial RV sales and/or rental facility or business.

17. On June 15, 2009, the Court entered its "Memorandum Decision and Order on Cross-Motions for Summary Judgment." The Court determined that Defendants had breached the terms of the QCA/Jacklin Agreement and Articles 3 and 4 of the CC&Rs incorporated therein. The Court declined, at that point in time, to grant summary judgment on the permanent injunction as requested by Jacklin.

18. In its June 15, 2009 Memorandum Decision, the Court made the following observations:

> [G]iven the terms of the Agreement, approval needed to be sought by Blue Dog and KLP in the first instance. Instead, Blue Dog simply started its business on KLP's property without asking for approval from anyone. Blue Dog's business runs counter to the Agreement . . . . Blue Dog put itself in violation by starting its business without checking (or if it checked, then disregarding) the terms of the Agreement. When Blue Dog is already in violation of the Agreement, through only its own fault, why would Jacklin have a duty to "work with" Blue Dog on an acceptable plan?

See Memorandum Decision at pp. 16-17.

19. On July 13, 2009, Jacklin filed its Second Motion for Summary Judgment and Alternative Motion for Reconsideration. Those Motions sought entry of a permanent injunction based upon the Defendants' breaches of the subject Agreements as the Court determined to exist in its June 15, 2009 "Memorandum Decision." Jacklin's Motion, consistent with the relief requested

in the Complaint (filed August 22, 2008), sought entry of a permanent injunction directing the Defendants to cease and desist their utilization of the subject property for purposes of a commercial RV sales and/or rental facility or business, the same having been determined to be in violation of the subject Agreements.

20. Jacklin's Motion came on for hearing on August 10, 2009. On September 14, 2009, the Court entered its "Memorandum Decision and Order Granting Plaintiff's Motion for Reconsideration and Second Motion for Summary Judgment."

21. The Court's September 14, 2009 Memorandum Decision granted Jacklin's Motion for Summary Judgment on the claim for issuance of a permanent injunction consistent with that sought by Jacklin.

22. Plaintiff prepared a proposed form of Judgment, following entry of the Court's September 14, 2009 Memorandum Decision, and circulated the same to opposing counsel by fax, for opposing counsel's comment, on September 22, 2009. See Magnuson Affidavit (filed herewith) at Ex. A.

23. No comments were received by October 2, 2009. Accordingly, the proposed form of Judgment prepared by Plaintiff, which was consistent with the relief sought in the Complaint and through the two Motions for Summary Judgment, was lodged with the Court. Id. The proposed form of Judgment that was circulated September 22, 2009, and lodged October 2, 2009, sought to give the Defendants until October 25, 2009 within which to vacate the subject property (a date forty-one (41) days after entry of the Court's September 14, 2009 Order). Id. No comment was received from opposing counsel. Id.

24. Eleven (11) days later, on October 13, 2009, Defendants lodged a proposed alternative form of Judgment with the Court that proposed to give the Defendants, at their request, through November 30, 2009 within which to comply with the Court's September 14, 2009 Order. That proposed Judgment, submitted by the Defendants, would have given the Defendants seventy-seven (77) days after entry of the Court's September 14, 2009 Order within which to comply. It would also have given the Defendants nearly seventeen (17) months of usage of the subject property after Defendants had been notified that their use was in violation of the applicable Agreements and sixteen (16) months of use after Jacklin first demanded that the use cease.

25. On October 19, 2009, the Court entered its Judgment, directing that Defendants cease and desist from using the subject property for the storage and/or parking of RVs by October 25, 2009 at 5:00 p.m. The Court directed that the Defendants take any and all action necessary to timely comply with the terms of the Judgment and Permanent Injunction.

II. APPLICABLE STANDARDS.

The Court's October 19, 2009 Judgment provides that Defendants comply with the terms of the permanent injunction contained therein by October 25, 2009 at 5:00 p.m. Defendants filed a Notice of Appeal on October 23, 2009. Pursuant to IAR 13(a), the filing of the Notice of Appeal stays enforcement of the Court's October 19, 2009 Judgment for a period of fourteen (14) days. Hence, through the filing of the subject Notice of Appeal, Defendants have extended the date for compliance with the terms of the Court's October 19, 2009 Judgment, and the permanent injunction contained therein, through and including November 6, 2009.

Defendants have moved the Court, pursuant to IRCP 62(c), for entry of an order staying enforcement of the October 19, 2009 Judgment, and the permanent injunction contained therein,

during the duration of Defendants' appeal. IRCP 62(c) provides in pertinent part:

> When an appeal is taken from . . . [a] final judgment granting . . . an injunction . . ., the Court in its discretion may suspend . . . an injunction. . . during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

See IRCP 62(c). The standards incorporated in the Rule, and as expressed therein, are as follows. First, the granting of a stay of an injunction during the pendency of an appeal is discretionary. Second, if discretion is exercised to stay the injunction pending the appeal, there must be provision made by the requesting party, in the form of a bond or otherwise, which is acceptable to the Court and which serves for the protection of the rights of the adverse party.

III. ARGUMENT.

A. The Equities Do Not Favor the Defendants.

As part of their Motion, Defendants acknowledge, "A party seeking a stay must show irreparable harm is certain and great and that there is a clear and present need for equitable relief." See Defendants' Memorandum at p. 3 (emphasis added) (citing Knutson v. AG Processing, Inc., 302 F.Supp.2d 1023, 1037 (2004) (interpreting the identical Federal Rule of Civil Procedure 62(c). Defendants claim, "The balance of these equitable issues tips strongly in Blue Dog's favor." Id. at p. 4. The facts do not support the Defendants' assertion as to the equities of the case. This is not the first time that the Court has been called upon to examine the relative equities of the parties' respective positions with respect to matters at issue in this case. In its June 15, 2009 "Memorandum Decision and Order," the Court already held and determined why a "balancing of the equities" favors Jacklin over the Defendants:

> The point is, given the terms of the [QCA/Jacklin] Agreement, approval needed to be sought by Blue Dog and KLP in the first instance. Instead, Blue Dog simply started its business on KLP's property without asking for approval from anyone. Blue Dog's business runs counter to the Agreement. Thus, Defendants' argument that "... Jacklin categorically failed to work with Blue Dog and KLP to address any site concerns that Jacklin had or to work on an acceptable plan", ignores the fact that Blue Dog's business, which was already existing, at that time and failed to conform with the Agreement.... Blue Dog put itself in violation by starting its business without checking (or if it checked, then disregarding) the terms of the Agreement. When Blue Dog is already in violation of the Agreement, through only its own fault, why would Jacklin have a duty to "work with" Blue Dog on acceptable plans? Keep in mind the Agreement at subsection ii, reads: "QCA/KLP's predecessor agrees to work together with Seller [Jacklin] to achieve a mutually acceptable design and appearance for the shopping center so that it shall be aesthetically pleasing and compatible with other uses within Riverbend Commerce Park." There was no "mutually acceptable design" to be worked toward because Blue Dog had already implemented its business. This Court finds Jacklin's following argument persuasive:
>
> > Russell finally concludes by stating that, "Blue Dog offered to undertake substantial site improvements, on the four undeveloped lots, including landscaping and surface work." See Russell Affidavit at ¶23. He concludes that there wasn't anything Blue Dog could do "to satisfy Jacklin's concerns short of vacating the premises." Id. Offering to pay $50,000 to put gravel on four vacant lots without addressing the paving requirement, as clearly specified in the November 1999 Covenants, together with the signage, lighting, setback, and landscaping requirements (ignoring for the moment the "first class shopping center" and "mutually acceptable design" criteria) is hardly a proposal meriting serious consideration. Why should Jacklin consider a proposal (even though one was never submitted) which is incapable of complying with the unambiguous provisions of the Covenants that KLP acknowledges it is bound by?

See "Memorandum Decision and Order" (entered June 15, 2009) at pp. 16-17 (emphasis in original). There is no cogent reason or contradictory evidence offered by Defendants to suggest that the Court's prior ruling no longer applies.

Second, from a factual standpoint, viewing this case in its entire context, the Defendants have shown no equities in support of their position. Again, this is a discretionary call for the Court.

However, the factual summary set forth in Section I, supra, unequivocally and clearly supports the proposition that Blue Dog's hands are not clean. Blue Dog has had every opportunity, since the first week of its lease in July of 2008, to rectify the situation, to find an alternative location, and to acknowledge that which is undisputed, to-wit, the unambiguous provisions of the QCA/Jacklin Agreement that bind and control the Defendants' use of the subject property. Rather than address the situation, the Defendants have put their collective heads in the sand and now amazingly claim to the Court that equity is on their side.

The only new "evidence" offered by Blue Dog in support of its eleventh-hour attempt to invoke the mercy of the Court is the Affidavit of Rebecca Asplund. Ms. Asplund states that Blue Dog has been "attempting to find an alternative site to relocate Blue Dog's operation since June 2009." See Affidavit of Asplund at ¶ 4. Blue Dog consequently admits that it plainly ignored the unambiguous terms of the QCA/Jacklin Agreement since being advised of the same in early July of 2008, and, notwithstanding the demands of Jacklin to vacate the premises or bring the same into compliance with the subject Agreements, made a wilful business decision to remain on the property and refuse to honor Jacklin's demands. As this Court noted in its September 14, 2009 Memorandum Decision, "Blue Dog's violation of the restrictive covenants in this case was intentional . . . ." See Memorandum Decision at pp. 11-12. Why should one who intentionally and knowingly breaches a contractual undertaking be thereafter heard to invoke the equities of the Court? They should not.

Ms. Asplund further states that Blue Dog has "yet to locate an acceptable alternative site." See Asplund Affidavit at ¶ 4. That isn't to state that Blue Dog could not find an alternative site. It has only been unable to find an alternative site "acceptable" to Blue Dog, which could be a decision based on amorphous and subjective considerations not germane to equitable considerations.

Finally, Blue Dog had notice since the initiation of this proceeding, in August of 2008, that if its interpretation was incorrect, in light of the unambiguous provisions of the subject Agreements found applicable by the Court, that this day would come. Blue Dog further knew of the same on September 14, 2009 upon receipt of the Court's Memorandum Decision. Through the timing involved with the submittal of proposed Judgments (as outlined in the accompanying Affidavit of John F. Magnuson), Blue Dog has essentially obtained an additional period of time within which to remove itself, above and beyond the thirty (30) days originally proposed by Jacklin. Through the automatic stay resulting from the Defendants' filing of a Notice of Appeal, pursuant to IAR 13(a), Blue Dog has additionally benefitted by obtaining a period of time of nearly two months past entry of the Court's original Memorandum Decision within which to vacate. No efforts to vacate have been made. Blue Dog has now been utilizing the subject property in violation of unambiguous Agreements, brought to Blue Dog's attention in July of 2008, for sixteen (16) months.

In summary, it isn't enough for one to claim that they will be harmed in the absence of an order staying enforcement of the injunction. They need to show why the equities support the granting of the stay. No such showing has been made nor can any such showing be made based upon the facts at bar.

B. Blue Dog's Additional Arguments for Injunctive Relief Should Be Denied.

Blue Dog argues that the Decision in this case was "a close call" and "is now the subject of an appeal." In actuality, the issue wasn't that "close." In support of its Second Motion for Summary Judgment (alternatively styled as a Motion for Reconsideration), Jacklin set forth the considerable weight of authority from nearly every other jurisdiction addressing the issue. Those authorities supported Jacklin's position that a permanent injunction to enforce a breach of consensual CC&Rs

was an appropriate remedy even in the absence of proof of irreparable harm. As the Court has since held, Jacklin and QCA determined in advance that violation of the restrictive covenants would cause Jacklin harm. See Memorandum Decision (entered September 14, 2009) at p. 9. Further, as noted by the Court, "the Lessee (or purchaser of property subject to a restrictive covenant) is on notice of the restrictive covenant when the Lessee chooses to enter into the lease agreement." Id. at pp. 9-10.

The fact that Idaho had not specifically addressed this issue does not make it a "close call." That is particularly true given that the Defendants opposed Jacklin's Second Motion for Summary Judgment by citing authorities which were largely inapplicable (and so found to be inapplicable by the Court) under the facts at bar.

Blue Dog further contends that a stay is appropriate because Jacklin has not shown that it will suffer any injury in the absence of an injunction. This is untrue. Jacklin has shown that it is likely to suffer an injury in the event the injunction is stayed. Jacklin has been, however, unable to precisely quantify, in dollar terms, the nature of that damage. The Court has already passed upon this issue:

> [A] contrary ruling would leave the landowner with a lessee (or subsequent purchaser) who has entered into a lease (or purchase), with full notice and knowledge of this consensual restrictive covenant, who may later breach that restrictive covenant if the lessee or subsequent purchaser feels the landowner will have difficulty proving damages for his lost business. Any restrictive covenant for which damages would be difficult to prove would be worthless and impossible to enforce.

See Memorandum Decision (entered September 14, 2009) at p. 10.

Finally, the Court should note that the Motion for Stay was filed by all Defendants, including the ownership Defendants. While Blue Dog has argued that it will suffer some irreparable harm as a result of enforcement of the injunction during the pendency of an appeal, the ownership Defendants have not advanced any facts or argument in support of their companion request. This is important

to note. Through the stay requested by Blue Dog, KLP will likely earn two years of additional rent at $5,000 per month (or $120,000). That doesn't constitute irreparable harm on the part of KLP. In fact, it strains belief that the ownership Defendants could join in the request for a stay of the injunction, pending appeal, and argue for no security. That would leave them with $120,000 in rental income and no responsibility to Jacklin despite these Defendants' knowing and intentional breach of an unambiguous real property covenant.

C. In the Event the Court Exercises Discretion to Stay Enforcement of the Injunction, an Undertaking Must Be Furnished in an Amount Deemed Acceptable by the Court.

Blue Dog argues that the requirement of a bond or other undertaking, for the protection of the rights of Jacklin, is not necessary under IRCP 62(c). Defendants misread the Rule. The Rule states that the Court, in its discretion, may stay an injunction pending appeal, but that that stay is to be "upon such terms as to bond or otherwise as [the Court] considers proper for the security of the rights of the adverse party." In this regard, the Court should consider the following.

First, Defendants again claim that Plaintiff "has failed to provide any evidence of economic harm as a result of Blue Dog's presence." See Memorandum at p. 4. This is not true. Plaintiff has provided evidence of economic harm. It has been unable, however, for reasons well-known to the Court and previously argued, to quantify that economic harm. The inability to quantify that harm doesn't mean it doesn't exist. However, for reasons already recognized by the Court, the issue of irreparable harm in the context of the enforcement of a consensually-negotiated covenant on real property is irrelevant.

Second, if Blue Dog is to "skate" during the period of appeal, it will have equate to a judicial validation, for a period that could extend to two or more years (the period of the appeal), of a

knowing and intentional breach of an unambiguous covenant against real property.

Third, it is for the reasons set forth above, that the mandatorily-required posting of a bond or other security should be strictly and strongly enforced under the facts at bar. This bond or cash undertaking, to be posted with the Clerk as a condition of any stay, must be significant. Otherwise, the unambiguous covenants that were negotiated for Jacklin's benefit, and to which the Defendants knowingly succeeded, will mean nothing.

Jacklin will file its Memorandum of Costs and Affidavit of Attorney Fees. Jacklin will seek an award of costs and fees as the prevailing party in an action founded on a commercial transaction as provided by I.C. § 12-120(3). The commercial transaction lies in the QCA/Jacklin Agreement. The combined attorney fees and costs incurred by Jacklin, to date, given the lengthy and vigorous defense put up by the Defendants, approach $40,000. That does not include the fees expected to be incurred on appeal.

Typically, to stay enforcement of a money judgment on appeal, under the Idaho Appellate Rules, the party requesting the stay must post a bond or cash in the amount of 136% of the Judgment sought to be stayed. See IRCP 13(b)(15). If the Court is at all inclined to grant the requested stay, then the cash or bond for Jacklin's benefit, in the event Jacklin prevails in defending the Defendants' appeal, should be no less than $200,000. If Blue Dog is allowed to remain on the property for twenty-four (24) months (the typical time associated with an Idaho appeal), then the Defendant should pay into the Court the amount of rent that will accrue from Blue Dog to the ownership Defendants over this period of time ($120,000 calculated at twenty-four (24) months x $5,000 per month). Added to this sum should be the $40,000 in expected attorney fees and costs to be awarded Jacklin. This sum of fees, costs, and benefits to be earned by the Defendants during the period of any

proposed stay (rent) totals $160,000. Multiplied by the 136% requirement contained in IAR 13(b)(15) results in a bond or cash security, for the benefit of Jacklin, in the amount of $217,600.[2]

D. Blue Dog's Alternative Request for a Stay of a Temporary Nature Should Be Denied.

For the reasons set forth above, there are no equities to support the Defendants' position, and any stay beyond the automatic stay (fourteen (14) days) already in effect under IAR 13(a) should be denied.

V. CONCLUSION.

Based upon the reasons and authorities set forth herein, Plaintiff Jacklin Land Company respectfully requests that the Court deny the Defendants' "Motion to Stay Injunction Pending Appeal."

DATED this 28th day of October, 2009.

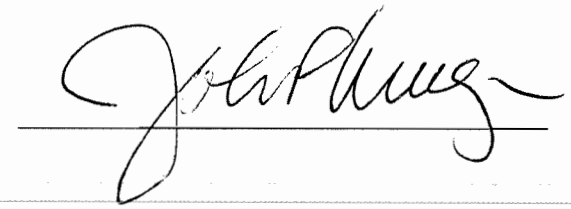
JOHN F. MAGNUSON
Attorney for Plaintiff

[2]The Court should consider that the subject Motion was filed on behalf of all Defendants. By perpetuating the stay, the ownership Defendants will make $120,000 in rent from Blue Dog while Jacklin's injunction is stayed, and Blue Dog will have the benefit of operating in violation of the Covenants at a reduced rental price of $5,000 per month. The Court should not countenance such conduct. However, if the Court exercises its discretion to stay the injunction, then the amount proposed as security, given the factors outlined herein, is reasonable.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2009, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael J. Hines	
Michael Schmidt	__X__ US Mail
Lukins & Annis, P.S.	____ Overnight Mail
1600 Washington Trust Financial Center	____ Hand Delivered
717 W. Sprague Avenue	__X__ Facsimile
Spokane, WA 99201-0466	FAX: 509/747-2323



JACKLIN-BLUE DOG.OPPINJNCTBRF.wpd

JOHN F. MAGNUSON
Attorney at Law
P.O. Box 2350
1250 Northwood Center Court, Suite A
Coeur d'Alene, ID 83814
Phone: (208) 667-0100
ISB #04270

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

vs.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

CASE NO. CV-08-6752

AFFIDAVIT OF JOHN F. MAGNUSON IN SUPPORT OF PLAINTIFF'S OBJECTION TO DEFENDANTS' "MOTION TO STAY INJUNCTION PENDING APPEAL"

STATE OF IDAHO)
) ss.
COUNTY OF KOOTENAI)

JOHN F. MAGNUSON, being first duly sworn upon oath, deposes and says:

1. I am the attorney of record for Plaintiff Jacklin Land Company. I am over the age of eighteen, have personal knowledge of the matters set forth herein, and am otherwise competent to testify thereto.

2. Attached hereto as Exhibit A is a true and correct copy of an October 16, 2009 letter, with the attachment to the letter, that was sent to the Court and to opposing counsel. The letter relates to the parties' alternative proposed Judgments then lodged with the Court.

DATED this 28th day of October, 2009.

JOHN F. MAGNUSON

SUBSCRIBED AND SWORN to before me this 28th day of October, 2009.

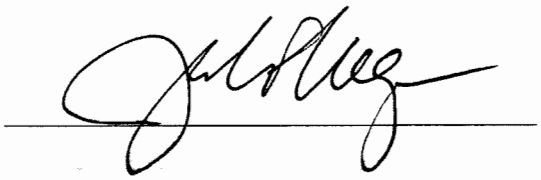
KRYSTI CLIFT
Notary Public
State of Idaho

Krysti Clift
Notary Public in and for the State of Idaho
Residing at: Coeur d'Alene
My commission expires: 11/13/14

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2009, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael J. Hines Michael Schmidt Lukins & Annis, P.S. 1600 Washington Trust Financial Center 717 W. Sprague Avenue Spokane, WA 99201-0466	_X__ US Mail ____ Overnight Mail ____ Hand Delivered _X__ Facsimile FAX: 509/747-2323



JACKLIN-BLUE DOG JFM AFF.wpd

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ATTORNEY AT LAW

ADMITTED IN IDAHO AND WASHINGTON

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P.O. BOX 2350
1250 NORTHWOOD CENTER COURT
SUITE A
COEUR D'ALENE
IDAHO 83816

October 16, 2009

Honorable John T. Mitchell
District Judge
501 Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-1972

Re: Jacklin Land Company v. Blue Dog RV, Inc., et al.
Kootenai County Case No. CV-08-6752

Dear Judge Mitchell:

This letter relates to the proposed form of Judgment to be entered following the Court's June 15, 2009 and September 14, 2009 "Memoranda Decisions and Orders."

The Court's September 14, 2009 Memorandum Decision and Order effectively resolved the remainder of this case. Following entry of that Order, I prepared a proposed form of Judgment. That proposed form of Judgment was provided to opposing counsel for comment by fax on September 22, 2009. Follow-up requests for comments were e-mailed to opposing counsel on September 28,, September 30, and October 2.

On October 2, 2009, with no comment forthcoming, I wrote the Court, with a copy to counsel, providing the proposed form of Judgment that had been prepared and first circulated for comment on September 22.

The proposed form of Judgment sought to give the Defendants until October 25, 2009 within which to vacate the subject property (a date forty-one (41) days after entry of the Court's September 14, 2009 Order). No comment was received from opposing counsel.

On October 9, 2009, by letter, I advised the Court and counsel that no comment had been received. On October 13, 2009, I received a fax with an alternative proposed Judgment that would give the Defendants through November 30, 2009 within which to comply with the Court's September 14, 2009 Order.

The Plaintiff respectfully submits that the Judgment it proposed under cover of letter dated October 2, 2009 is appropriate and consistent with the Court's Memoranda Decisions. As noted, that Judgment seeks to give the Defendants forty-one (41) days to comply with the terms of the Court's

September 14, 2009 Order. One could infer that the Defendants are attempting to prolong matters to continue their use of the subject property, although only the Defendants know of their intentions.

The Court's Memoranda Decisions fully set forth the Court's reasoning and decisions. It is respectfully submitted that the proposed form of Judgment submitted by the Defendants unnecessarily restates or characterizes non-essential portions of the Court's ruling (i.e., non-essential to entry of the Judgment itself and the permanent injunction provided therein). It is also submitted that the proposed November 30, 2009 compliance date is, being seventy-seven (77) days after entry of the Court's September 14 Order, unreasonable.

Attached is a "marked up" copy of Defendants' proposed form of Judgment. This is the Judgment proposed under cover of Defendants' fax of October 13. Noted therein are certain paragraphs that are non-essential to the Judgment and which reiterate matters contained in the Court's Memoranda Decisions. The judgment is a Judgment. Non-essential matters should not be included therein. Where does one stop?

Noted on the attached form of Judgment at Paragraphs 9, 10, 15, 16, 17, 18, 19, and 20, as well as Paragraphs 2, 3, and 4 of the Prayer for Relief, are non-essential items to the Judgment and the permanent injunction contained therein. There is also a typographical error in Paragraph 14 which adds Article 7 of the CC&Rs which was not specifically incorporated by reference in the Jacklin/QCA Agreement.

We submit that the Court is now in a position to enter a form of Judgment that it deems appropriate.

Thank you.

Sincerely,

/s/

John F. Magnuson

JFM/js
Encl.
cc: Michael J. Hines (w/encl.)
MITCHELL.LTR RE JACKLIN-BLUE DOG8.wpd

Defendants' Proposed Judgment 9/10/13

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

v.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants.

NO. CV-08-6752

JUDGMENT

THE COURT, having previously entered its June 15, 2009 "Memorandum Decision and Order on Cross-Motions for Summary Judgment" and its September 14, 2009 "Memorandum Decision and Order Granting Plaintiffs Motion for Reconsideration, Granting Plaintiff's Second Motion for Summary Judgment, and Denying Defendants' Motion for Reconsideration," HEREBY ENTERS this final Judgment in accordance with IRCP 58(a) and 65(d).

FINDINGS

The Court's June 15, 2009 Order and September 14, 2009 Order made the following findings which are restated herein:

1. The subject property as defined herein is legally described as Lots 1-4, Block 1, Riverbend Commercial Park Phase I, according to the plat recorded in the office of the County Recorder in Book F of Plats at page 224, records of Kootenai County, Idaho. Said property is referred to herein as "the subject property."

2. On November 7, 1990, Plaintiff Jacklin Land Company (hereafter "Jacklin") and Quality Centers Associates impressed upon the subject property certain specific covenants through an agreement recorded as Kootenai County Instrument No. 1200512. That Agreement is referred to herein as "the subject Agreement."

3. Quality Centers Associates is the predecessor-in-interest to the "Ownership Defendants," a term defined to include those Defendants who own title to the subject property other than Blue Dog RV, Inc.

4. The subject Agreement specifically incorporated as covenants burdening the subject property Articles 2 through 6 of the following instruments of record in Kootenai County:

INSTRUMENT NO:	**RECORDATION DATE**
1135200	November 28, 1988
1155659	July 26, 1989
1155779	July 27, 1989

Articles 2-6 of said instruments, as described above, are referred to herein as "the applicable CC&Rs."

5. On July 1, 2008, the Ownership Defendants leased the subject property to Defendant Blue Dog RV, Inc. which has thereafter utilized the subject property for purposes of a commercial recreational vehicle (RV) sales business.

6. The subject Agreement requires Defendants to construct and maintain a first-class shopping center on the subject property, to work with Jacklin to achieve a mutually acceptable design and appearance for the shopping center, and to conform to Articles 2, 3, 4, 5, and 6 of the applicable CC&Rs last amended through Kootenai County Instrument No. 1155779.

7. What constitutes a first-class shopping center as referenced in the Agreement is undefined and ambiguous.

8. There is no ambiguity that Blue Dog's RV Sales lot is not a "shopping center." Accordingly, the Court finds that part "i" of the subject Agreement has been violated by Blue Dog's current use of the subject property.

9. Defendants did not provide the Court with definitive evidence of Defendants' attempts to work together with Jacklin or to submit for approval use of the subject property.

10. There is no evidence in the record to support Defendants' claim that (1) at no time did Jacklin ever attempt to work with KLP to address any concerns that Jacklin had with respect to Blue Dog's operation; (2) the only option Jacklin ever gave KLP was to have Blue Dog immediately vacate the property or be sued; (3) Jacklin never made any attempt to work with Blue Dog or KLP on a site plan or to address any site concerns of Blue Dog's operation; (4) KLP offered to spend upwards of $50,000 to make site improvements, which Jacklin similarly rejected; and (5) Jacklin stated that any site plans submitted by Blue Dog and/or KLP would have been rejected, and no site improvements would be satisfactory to placate their opposition.

11. Accordingly, the Court finds that there was no effort on the part of Defendant Blue Dog or the Ownership Defendants prior to implementing the uses to which the property has currently been put by Blue Dog to "work together with Seller [Jacklin] to achieve a mutually acceptable design and appearance for the shopping center so that it shall be aesthetically pleasing and compatible with other uses within Riverbend Commerce Park."

Therefore, the Court finds that part "ii" of the subject agreement has been violated by the Ownership Defendants and Defendant Blue Dog.

12. The Court finds that Defendant Blue Dog and the Ownership Defendants, through their current use, have violated part "iii" of the subject Agreement by failing to comply with the requirements of Articles 3 of the CC&Rs. Specifically. Defendant Blue Dog and the Ownership Defendants have failed to comply with the requirements of Article 3.2 (landscaping), 3.4 (asphalt or concrete parking areas), and 3.5 through 3.8 (requirements pertaining to lighting, access, and striping and the necessity for submitting a prior request to Jacklin for approval of any proposed parking plan).

13. The Court finds that Defendant Blue Dog and the Ownership Defendants, through their current use, have violated part "iii" of the subject Agreement by failing to comply with Article 4 of the CC&Rs (setting forth signage requirements including design, appearance, and prior approval by Jacklin), and

14. Articles 2, 5, 6 ~~and 7~~ of the applicable CC&Rs are either ambiguous or are disputed as to Blue Dog's violation.

15. The Jacklin property, which remains in the Riverbend Commerce Park, is subject to a whole separate set of restrictions, in the form of the current covenants and any subject amendments thereto, wholly different than the applicable CC&Rs that apply to the subject property.

16. The defenses of estoppel and waiver do not apply when the KLP property and the Jacklin property are so vastly different.

17. Jacklin has not provided the Court with evidence of waste or great injury with respect to Blue Dog's RV operation or Defendants' conduct.

18. There is no testimonial or even argument in the record as to why any damage suffered by Jacklin as a result of Blue Dog's RV operation or Defendants' conduct could not be compensated with a monetary award.

19. The testimony regarding damage caused by Blue Dog's RV operation and Defendants' conduct is speculative at the present time in that Jacklin has not pointed to a tenant that has left, is thinking about leaving, or a prospective tenant that has decided not to rent land as a result of the presence of Blue Dog.

20. Jacklin has not alleged Defendants' are removing or disposing of their own property with intent to defraud Jacklin.

CONCLUSIONS

Based upon the foregoing findings, and pursuant to IRCP 65(d) and IRCP 58, the Court HEREBY ENTERS JUDGMENT in favor of Jacklin and against Defendant Blue Dog RV, Inc. and the Ownership Defendants as follows:

1. Jacklin's Complaint alternatively seeks injunctive relief under Jacklin's claim for a permanent injunction and under Jacklin's claim pursuant to the Uniform Declaratory Judgments Act, I.C. §10-1201, et seq. Jacklin seeks prospective declaratory and injunctive relief ordering that Defendants' use of the subject property comply with the terms of the subject agreement and Articles 3 and 4 of the CC&Rs as have been determined to apply by the Court.

2. The declaratory judgment Jacklin seeks could likely not provide Jacklin the authority to evict Blue Dog, but would provide Jacklin the authority to have the Court order Blue Dog to cease its business as it presently exists, since it is in violation of the Agreement and the applicable CC&Rs.

3. No irreparable harm need be shown when issuing a permanent injunction to enforce a restrictive covenant.

4. The conditions of IRCP 65(e) are applied to requests for preliminary injunctive relief, not requests for permanent injunctive relief such as the present case.

5. The current use of the subject property by Defendant Blue Dog, under lease from the Ownership Defendants, violates parts "i," "ii," and "iii" of the subject Agreement and Articles 3 and 4 of the CC&Rs incorporated into part "iii" of the subject Agreement.

6. Defendants and each of them, and any and all persons-or parties claiming from or under or by Defendants, with respect to the subject property, are HEREBY ORDERED to cease and desist from using the subject property for the storage and/or parking of RV s by November 30, 2009 at 5 :00 p.m. Defendant shall take any and all action necessary to timely comply with the terms of this Order.

7. From and after compliance with the terms of Paragraph 3 above, Defendants and each of them and any and all persons or parties claiming by, through, or under Defendants are permanently enjoined from hereafter utilizing the subject property or any portion thereof in any manner that does not otherwise comply with the substance and procedures contained in the subject Agreement and Articles 2-6 of the CC&Rs incorporated therein.

8. This Court-shall retain jurisdiction, under IAR 13 (b)(1()) and (13), to enforce the terms of this Judgment during the pendency of any appeal which either or both of the Defendants may hereafter file from this Judgment.

9. This Judgment is a final judgment for purposes of IRCP 58.

10. Any request of award for costs or attorney fees shall be determined by supplemental order and judgment consistent with the procedures set forth in IRCP 54(d), and (e).

IT IS SO ORDERED.

ENTERED this ____ day of October, 2009.

JOHN T. MITCHELL District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of October, 2009, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael J. Hines Michael Schmidt Lukins & Annis, P.S. 1600 Washington Trust Financial Center 717 W. Sprague Avenue Spokane, WA 99201-0466	_____ US Mail _____ Overnight Mail _____ Hand Delivered __X__ Facsimile **FAX: 509/747/2323**
John F. Magnuson Attorney at Law P.O. Box 2350 1250 Northwood Center Court, Suite A Coeur d'Alene, ID 83814	_____ US Mail _____ Overnight Mail _____ Hand Delivered __X__ Facsimile **FAX: 208\667-0500**

S[illegible]E OF IDAHO)
County of KOOTENAI)ss
FILED 10/29/09
AT 5:00 O'Clock P M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff,

vs.

BLUE DOG RV, INC., an Idaho corporation, et al.

Defendants.

Case No. **CV 2008 6752**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO STAY INJUNCTION PENDING APPEAL

I. PROCEDURAL HISTORY AND BACKGROUND.

The following are the facts as recited by this Court in its June 15, 2009, Memorandum Decision and Order on Cross-Motions for Summary Judgment:

> As part of plaintiff Jacklin Land Company's (Jacklin) development of the Riverbend Commerce Park, which was platted in 1988, Jacklin recorded an original set of covenants, "Declaration of Covenants, Conditions, and Restrictions of Riverbend Commerce Park." Affidavit of Tom Stoeser, Exhibit B. These covenants were later amended in 1989. The amended covenants encumbered the property which is presently leased by defendant Blue Dog RV, Inc. (Blue Dog), which is the subject of this litigation. Affidavit of Tim Stoeser, Exhibit C.
>
> In 1990, Quality Centers Associates (QCA), the predecessor in interest of defendant KL Properties, Inc. (KLP), wished to purchase the property KLP now owns, and QCA asked Jacklin to remove the 1989 covenants then in effect, as a matter of title. Jacklin agreed on the terms and conditions memorialized in the QCA/Jacklin Agreement (hereinafter "Agreement"), dated November 7, 1990, which removed the then-existing Declaration of Covenants, Conditions, and Restrictions in return for QCA agreeing: (1) to construct and maintain a first-class shopping center; (2) to work with Jacklin to achieve a mutually accepted design and appearance for the shopping center, and (3) to agree to comply with Articles 2,3,4,5,

and 6 of the Declarations of Covenants, Conditions, and Restrictions recorded in 1988, as subsequently amended. Affidavit of Pat Leffel, Exhibit B. This agreement between QCA and Jacklin was unique to the property now at issue, Lots 1 to 4 (of Lots 1 to 17) of Block 1 of Phase I of the development, and differs from the covenants applicable to the Riverbend Commerce Park generally. After purchasing lots 1 to 17, QCA worked with Jacklin and achieved a mutually acceptable design and appearance for the Factory Outlets on Lots 5-17 of Block 1. In 2005, KLP purchased the property from QCA, including Lots 1 to 17 of Block 1.

On July 1, 2008, Blue Dog entered into a lease with KLP for Lots 1-4 of Block 1. Jacklin filed its motion for summary judgment on December 11, 2008. Jacklin moves for summary judgment on its claims for a permanent injunction prohibiting the use of the property for an RV dealership/facility and for declaratory judgment that the uses the defendants have put the property to violate the QCA/Jacklin Agreement. Defendants argue no interpretation of the Agreement would prohibit Blue Dog's RV Center. Defendants argue Jacklin has not made a showing of irreparable injury to support injunctive relief. Defendants argue Jacklin itself breached the Agreement. Finally, defendants argue defendants' waiver and estoppel defenses preclude summary judgment in Jacklin's favor. On February 17, 2009, defendants filed "Defendants Cross-Motion for Summary Judgment." Following extensive briefing and submission of affidavits by both parties, which the Court has considered, oral argument was heard on March 3, 2009. On March 31, 2009, Jacklin filed a "Supplemental Citation of Authority by Plaintiff." That supplemental authority is *Bushi v. Sage Health Care, PLLC,* 2009 Opinion No. 30, 09.6 ISCR 244 (March 4, 2009), a case concerning good faith and fair dealing.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 1-3.

On June 15, 2009, this Court filed its "Memorandum Decision and Order on Cross-Motions for Summary Judgment." At the conclusion of that twenty-seven page decision, this Court ordered as follows:

> **IT IS HEREBY ORDERED** plaintiff's motion for summary judgment is GRANTED in favor of plaintiffs on the following issues: 1) The QCA/Jacklin Agreement is enforceable against defendants; 2) the Agreement is a "Use" agreement and not a "development" agreement; 3) Articles 2, 3, 4, 5, and 6 of the Declaration of Covenants, Conditions, and Restrictions apply to defendants; 4) defendants have violated the Agreement.
>
> **IT IS FURTHER ORDERED** plaintiff's motion for summary judgment is DENIED as to its entitlement to declaratory relief sought (eviction) and injunctive relief sought, at this time.
>
> **IT IS FURTHER ORDERED** defendant's motion for summary judgment is DENIED in all aspects, and specifically, this Court finds plaintiff has not breached the covenant of good faith and fair dealing and

defendants are not entitled to the defense of waiver or estoppel.

On July 13, 2009, plaintiff Jacklin Land Company (Jacklin) filed "Plaintiff's Motion for Reconsideration", "Plaintiff's Second Motion for Summary Judgment", and "Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration." On July 27, 2009, defendants filed a "Response to Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration. On July 27, 2009, defendants (collectively referred to as "Blue Dog") also filed "Defendants' Motion for Reconsideration", a "Memorandum in Support of Defendants' Motion for Reconsideration" and an "Affidavit of Michael J. Hines in Support of Defendants' Motion for Reconsideration." On August 5, 2009, Jacklin filed its "Reply Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration." On August 7, 2009, defendants filed their "Reply Memorandum in Support of Defendants' Motion for Reconsideration."

On September 22, 2009, this Court issued its Memorandum Decision and Order Granting Motion for Reconsideration, Granting Plaintiff's Second Motion for Summary Judgment and Denying Defendants' Motion for Reconsideration. After reviewing several cases, this Court held:

> As noted by Jacklin (Reply Memorandum in Support of Plaintiff's (1) Second Motion for Summary Judgment and (2) Motion for Reconsideration, p. 10), the Washington Court of Appeals case of *W.F. Hagemann v. Worth,* 56 Wn.App. 85, 782 P.2d 1072 (1989), has clearly held:
>
> > In Washington, owners of land have an equitable right to enforce covenants by means of a general building scheme designed to make it more attractive for residential purposes, without showing substantial damage from the violation.
>
> 782 P.2d 1072, 1974.
>
> This Court agrees with Jacklin's argument that the "irreparable harm" requirement is inapplicable regarding a prayer for injunctive relief **where a breach of a restrictive covenant is alleged.** Thus, it is proper for this Court to grant the injunctive relief sought by Jacklin. This is also the case if the Court were to balance the equities in determining Jacklin's

entitlement to a permanent injunction.

Memorandum Decision and Order Granting Motion for Reconsideration, Granting Plaintiff's Second Motion for Summary Judgment and Denying Defendants' Motion for Reconsideration, p. 12. (emphasis added). The Court then stated:

> While the facts of this case have not changed, this Court has been given new information in the form of overwhelming case law which provides the basis for this Court to overturn this Court's previous ruling. *Jordan v. Beeks,* 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

Id. p. 15. At the conclusion, the Court held:

> For the reasons stated above, this Court exercises its discretion and grants Jacklin's motion for reconsideration/summary judgment, finding as a matter of law that no irreparable harm need be shown when issuing a permanent injunction to enforce a restrictive covenant. Because no such showing need be made, this Court denies Blue Dog's motion for reconsideration (asking the Court to hold as a matter of law that Jacklin cannot make any showing of irreparable injury and to determine as a matter of law that Jacklin cannot recover damages).
>
> IT IS HEREBY ORDERED plaintiff Jacklin's Motion for Reconsideration is GRANTED, plaintiff Jacklin's Second Motion for Summary Judgment is GRANTED.
>
> IT IS FURTHER ORDERED defendants' Motion for Reconsideration is DENIED.

Id., p. 17.

On October 19, 2009, this Court entered a Judgment. On October 23, 2009, defendants filed "Defendants' Notice of Appeal." Also on October 23, 2009, defendants filed: Motion to Stay Injunction Pending Appeal, Motion to Shorten Time to Hear Motion to Stay Injunction Pending Appeal, and Affidavit of Rebecca Asplund (an owner of defendant Blue Dog). On October 28, 2009, plaintiff Jacklin filed its: "Plaintiff's Objection to Defendants' 'Motion to Stay Injunction Pending Appeal'", "Memorandum in Opposition to Defendants' 'Motion to Stay Injuction Pending Appeal'", and "Affidavit of John F. Magnuson in Support of Plaintiff's Objection to Defendants' 'Motion to Stay Injunction Pending Appeal'". Oral argument was held on October 29, 2009.

At oral argument, the Court granted defendants' Motion to Shorten Time, and took the Motion to Stay Injunction Pending Appeal under advisement.

II. STANDARD OF REVIEW.

The Court's decision to stay an injunction pending appeal is discretionary. Idaho Rule of Civil Procedure 62(c) states:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction or writ of mandate, the court in its discretion may suspend, modify, restore, or grant an injunction or writ of mandate during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security rights of the adverse party.

III. ANALYSIS.

Blue Dog moves this Court for an order staying the permanent injunction issued by this Court pending appeal. Blue Dog has provided the Court with the Affidavit of Rebecca Asplund (co-owner of Blue Dog along with her husband) to demonstrate that irreparable harm would inure to Blue Dog if the permanent injunction were not stayed pending appeal. Memorandum in Support of Motion for Stay, p. 3. Asplund states Blue Dog has sought an alternative site to which Blue Dog could relocate since June 2009, but "Unfortunately, we have yet to locate an acceptable alternative site." Affidavit of Rebecca Asplund, p. 2, ¶ 4. However, Asplund does not provide any explanation of what an "acceptable alternative site" means. Asplund provides no review of the properties Blue Dog has viewed, where they are located and why they would not be "acceptable." The nature of Blue Dog's business would require simply vacant land, properly zoned, presumably on or near a high-traffic street or highway.

Asplund goes on to state Blue Dog is seeking a construction loan and hopes to fully vacate Jacklin's site and relocate by June 2010. *Id.* This statement ignores the fact that had Big Dog obtained a construction loan in 2008, met with and obtained

Jacklin's approval of a plan which satisfied all the covenants, and then built those approved improvements, Blue Dog would not have found itself in this lawsuit.

As pertains to irreparable harm, Asplund states she believes being forced to close Blue Dog's operations before finding an alternative site would result in Blue Dog needing to file for bankruptcy and losing approximately $300,000 in gross revenue per month. *Id.*, p. 3, ¶ 5. That statement assumes that in fact there is nowhere Blue Dog can relocate, or at least that statement assumes that if there is a place Blue Dog can relocate, they will sell not a single motor home or trailer.

Blue Dog states this significant injury would result despite the decision it now appeals having been a close call for the Court as no Idaho authority was directly on point (as to whether actual harm must be shown to enjoin violation of a restrictive covenant) and that the equities balance in favor of Blue Dog. Memorandum in Support of Motion to Stay, p. 3. However, Blue Dog does not explain how the equities tip in their favor. The claim ignores the fact that the reason Blue Dog is in the situation it now finds itself (needing to relocate) is because Blue Dog set up its recreational vehicle sales lot without approval from Jacklin. This is a situation truly of Blue Dog's own making.

Blue Dog goes on to argue if the Court deems a stay of the permanent injunction is proper, no bond should be required. *Id.*, p. 4. Blue Dog notes the bond requirement of I.R.C.P. 62(c) is not mandatory and, because Jacklin had not demonstrated any actual harm below, no bond is necessary and the Court would need to speculate as to the appropriate amount of any bond. *Id.* Finally, Blue Dog requests the Court to extend the automatic stay provision in I.A.R. 13(a) (which extends the current deadline form the October 25, 2009, date imposed by this Court's Judgment to fourteen days from the filing of the Notice of Appeal on October 23, 2009 (to November 6, 2009)) pursuant to

I.A.R. 13(b) so that a stay may be sought from the Idaho Supreme Court. *Id.,* p. 5.

In response, Jacklin argues the equities do not balance in favor of Blue Dog, regardless of any harm that would result. Memorandum in Opposition to Motion to Stay, p. 8. Jacklin notes this Court's having previously determined that the equities in this case favor Jacklin and argues Blue Dog has:

> ...had every opportunity, since the first week of its lease in July of 2008, to rectify the situation, to find an alternative location, and to acknowledge that which is undisputed, to-wit, the unambiguous provisions of the QCA/Jacklin Agreement that bind and control the Defendants' use of the subject property. Rather than address the situation, the Defendants have put their collective heads in sand and now amazingly claim to the Court that equity is on their side.

Id., pp. 9-10. Jacklin argues Asplund's affidavit does nothing to counter the fact that Blue Dog has had notice since August 2008 that relocation was a possible outcome of the parties' differing interpretations of the QCA/Jacklin Agreement. *Id.,* p. 11. "Blue Dog has now been utilizing the subject property in violation of unambiguous Agreements, brought to Blue Dog's attention in July of 2008, for sixteen (16) months." *Id.* Jacklin states Blue Dog is in error in suggesting the case was a close call and notes the Court held Jacklin and QCA "determined in advance that violation of the restrictive covenants would cause Jacklin harm." *Id.,* p. 12. Jacklin goes on to note a stay would provide the other named defendants, including KLP- the ownership defendants, with rental income while they must demonstrate no irreparable harm. *Id.,* p. 13.

As to Blue Dog's argument that the Court should set no bond because any amount would be speculative in light of Jacklin's inability to show actual harm below, Jacklin states Blue Dog misreads the rule. *Id.* While Rule 62(c) does not make a bond requirement mandatory, a suspension, modification, etc. of the injunction is "upon such terms as to bond or otherwise as [the Court] considers proper for the security of the

rights of the adverse party." *Id.,* quoting I.R.C.P. 62(c). Jacklin notes it is merely unable to quantify economic harm, but that harm is presumed once the restrictive covenant is violated and that Blue Dog would skate on such violations for a period of two years while the matter is on appeal. *Id.,* pp. 13-14. Jacklin requests a significant bond or cash undertaking (no less than $200,000) be posted with the Clerk as a condition of any stay, if a stay is granted. *Id.,* pp. 14-15.

Both parties agree that the applicable law is that a party seeking a stay must show irreparable harm, that such irreparable harm be certain and great, and that there is a clear and present need for equitable relief. Memorandum in Support of Motion to Stay, p. 3; Memorandum in Opposition to Stay, p. 8; *Knutson v. AG Processing, Inc.,* 302 F.Supp.2d 1023, 1037 (2004). As noted by Blue Dog, the irreparable harm must be "certain." Memorandum in Support of Motion to Stay, p. 3, citing *Ashland Oil, Inc. v. FTC,* 409 F.Supp. 297 307 (D. D.C. 1976). Here, while Blue Dog has certainly claimed irreparable harm, and that such harm is great (a loss of $300,000 in gross revenues per month), there has been no evidence presented as to the basis for that claim and there has been no evidence as to the "certainty" of such harm resulting. Nor, as Jacklin argues, and this Court has held on two prior occasions, do the equities of this case balance in Blue Dog's favor. Additionally, Jacklin's reading of I.R.C.P. 62(c) is more accurate. Idaho Rule of Civil Procedure 62(c) gives the Court discretion to grant a stay of an injunction on terms the Court feels properly secure the rights of the adverse party.

Thus, a stay in this matter, if granted, should be upon terms that properly secure Jacklin's rights. Whether those terms amount to a "bond or otherwise" is a matter left to the Court's discretion. Finally, any grant by this Court of an I.A.R. 13(b)(8) stay until Blue Dog can seek a stay from the Supreme Court is also a matter committed to the

Court's discretion. I.A.R. 13(b)(8) permits the Court to enter a stay of execution or enforcement of any injunction or mandatory order entered "upon such conditions and upon the posting of such security as the court determines in its discretion." Thus, the Court's reasoning on Blue Dog's motion for a stay under I.R.C.P. 62(c) would be identical to that under I.A.R. 13(b)(8).

IV. CONCLUSION AND ORDER.

For the reasons set forth above, Blue Dog has not demonstrated the certainty of irreparable harm, and has not shown the equities balance in its favor. Blue Dog's Motion to Stay Injunction Pending Appeal under I.R.C.P. 62(c) and I.A.R. 13(b)(8) must be denied.

IT IS HEREBY ORDERED defendant Blue Dog's Motion to Shorten Time is GRANTED; defendant Blue Dog's Motion to Stay Injunction Pending Appeal is DENIED, thus, the issue of surety bond pending appeal is not addressed.

Entered this 29th day of October, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 30 day of October, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #
John Magnuson	667-0500

Lawyer	Fax #
Michael Hines	509-747-2323

Secretary

In the Supreme Court of the State of Idaho

JACKLIN LAND COMPANY, an Idaho limited partnership,

Plaintiff-Respondent,

v.

BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST created u/t/a dated February 25, 2000; GAYLEN C. PATTERSON, Trustee; THE BRANAGH FAMILY 2000 TRUST created u/t/a dated January 13, 2000; JOHN A. BRANAGH, Trustee; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife,

Defendants-Appellants.

ORDER GRANTING EMERGENCY APPLICATION FOR EX PARTE TEMPORARY STAY

Supreme Court Docket No. 37076-2009
Kootenai County District Court No. 2008-6752

Ref. No. 09S-549

An EMERGENCY APPLICATION FOR EX PARTE TEMPORARY STAY and AFFIDAVIT OF REBECCA ASPLUND IN SUPPORT OF DEFENDANTS' REQUEST FOR STAY OF INJUNCTION were filed by Appellant Blue Dog RV, Inc. on November 4, 2009, requesting an ex parte temporary stay, on an emergency basis, pending this Court's resolution of Appellants' Motion for Stay of Injunction Pending Appeal under I.A.R. 13(g), which will be filed by Blue Dog RV, Inc. on or before November 6, 2009. The Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant Blue Dog RV, Inc.'s EMERGENCY APPLICATION FOR EX PARTE TEMPORARY STAY be, and hereby is, GRANTED and execution of the Order and Injunction issued by the district court is hereby STAYED pending the determination of Appellants' Rule 13(g) application to this Court for a stay during the appeal.

DATED this 5th day of November 2009.

By Order of the Supreme Court

Karel A. Lehrman, Chief Deputy Clerk for
Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge John T. Mitchell

IDAHO SUPREME COURT

Clerk of the Courts
(208) 334-2210

IDAHO COURT OF APPEALS

P.O. Box 83720
Boise, Idaho 83720-0101

DANIEL J. ENGLISH, CLERK
KOOTENAI COUNTY COURTHOUSE
324 W GARDEN - PO BOX 9000 DC civil
COEUR D ALENE, ID 83816-9000

TRANSMITTAL OF DOCUMENT

Docket No. 37076-2009	JACKLIN LAND COMPANY v. BLUE DOG RV, INC.	Kootenai County District Court Docket 2008-6752

The enclosed document(s) relating to the above-entitled case is/are forwarded for your information.

For the Court:
Stephen W. Kenyon
Clerk of the Courts

11/05/2009 02:48 PM KL

STATE OF IDAHO
COUNTY OF KOOTENAI ss
FILED:

2009 NOV 18 PM 12: 29

CLERK DISTRICT COURT

DEPUTY

In the Supreme Court of the State of Idaho

JACKLIN LAND COMPANY, an Idaho limited partnership, Plaintiff-Respondent, v. BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST created u/t/a dated February 25, 2000; GAYLEN C. PATTERSON, Trustee; THE BRANAGH FAMILY 2000 TRUST created u/t/a dated January 13, 2000; JOHN A. BRANAGH, Trustee; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife, Defendants-Appellants.	ORDER GRANTING RESPONDENT'S MOTION FOR EXTENSION OF TIME TO FILE RESPONSE Supreme Court Docket No. 37076-2009 Kootenai County District Court No. CV 2008-6752 Ref. No. *NONE—per oral Order of the Court*

A MOTION OF RESPONDENT JACKLIN LAND COMPANY FOR AN EXTENSION OF TIME PURSUANT TO IAR 32(d) and AFFIDAVIT OF JOHN F. MAGNUSON IN SUPPORT OF "MOTION OF RESPONDENT JACKLIN LAND COMPANY FOR AN EXTENSION OF TIME PURSUANT TO IAR 32(d)" were filed by counsel for Respondent on November 16, 2009, requesting this Court for entry of an Order extending the time within which Respondent Jacklin Land Company is to respond to Appellant Blue Dog RV, Inc.'s "Motion to Stay Injunction Pending Appeal" from November 19, 2009 through and including November 27, 2009. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondent Jacklin Land Company's MOTION FOR EXTENSION OF TIME be, and hereby is, GRANTED and Respondent Jacklin Land Company shall file a RESPONSE with this Court to Appellant Blue Dog RV, Inc.'s Motion to Stay Injunction Pending Appeal ON OR BEFORE NOVEMBER 27, 2009.

877

DATED this 17th day of November 2009.

By Order of the Supreme Court

Stephen W. Kenyon, Clerk

cc: Counsel of Record

STATE OF IDAHO)
COUNTY OF KOOTENAI) ss
FILED:

In the Supreme Court of the State of Idaho

2009 DEC 17 PM 2:38

CLERK DISTRICT COURT
DEPUTY

JACKLIN LAND COMPANY, an Idaho limited partnership, Plaintiff-Respondent, v. BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST created u/t/a dated February 25, 2000; GAYLEN C. PATTERSON, Trustee; THE BRANAGH FAMILY 2000 TRUST created u/t/a dated January 13, 2000; JOHN A. BRANAGH, Trustee; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife, Defendants-Appellants.	ORDER GRANTING MOTION TO STAY INJUNCTION PENDING APPEAL Supreme Court Docket No. 37076-2009 Kootenai County District Court No. 2008-6752 Ref. No. 09-604

1. BLUE DOG RV, INC.'S MOTION TO STAY INJUNCTION PENDING APPEAL with attachments was filed by counsel for Appellants on November 6, 2009. Thereafter, an AFFIDAVIT OF JOHN F. MAGNUSON with attachments was filed by counsel for Respondent on November 6, 2009.

2. JACKLIN LAND COMPANY'S MEMORANDUM IN OPPOSITION TO BLUE DOG RV, INC.'S MOTION TO STAY INJUNCTION PENDING APPEAL with attachments, a SECOND AFFIDAVIT OF JOHN F. MAGNUSON, an AFFIDAVIT OF BRUCE CYR IN OPPOSITION TO BLUE DOG RV, INC.'S MOTION TO STAY INJUNCTION PENDING APPEAL and an AFFIDAVIT OF THOMAS STOESER IN OPPOSITION TO BLUE DOG RV, INC.'S MOTION TO STAY INJUNCTION PENDING APPEAL were filed by counsel for Respondent on November 27, 2009.

The Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that BLUE DOG RV, INC'S MOTION TO STAY INJUNCTION PENDING APPEAL be, and hereby is, GRANTED and the Judgment entered by the district court on October 19, 2009 SHALL BE STAYED pending a decision of this Court on appeal.

DATED this 15th day of December 2009.

By Order of the Supreme Court

Karel A. Lehrman, Chief Deputy Clerk for
Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge John T. Mitchell

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited Partnership, Petitioner/Respondent, vs. BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California Corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife, Defendants/Appellants.	CIVIL CASE NO. CV-08-6752 PLAINTIFF'S CERTIFICATE OF EXHIBITS

I, DANIEL J. ENGLISH, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court of Appeals.

I FURTHER CERTIFY that the following documents will be submitted as exhibits to the Record: **NONE.**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 11 day of Feb., 2008.

DANIEL J. ENGLISH
Clerk of District Court

By: Susan Reed

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY
CLERK OF COURT
STATE OF IDAHO

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership, Petitioner/Respondent, vs. BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife, Defendants/Appellants.	CIVIL CASE NO. CV 08-6752 SUPREME COURT DOCKET #37076-2009

CLERK'S CERTIFICATE OF SERVICE

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record and the Reporter's Transcript to each of the Attorneys of Record in this cause as follows:

Attorney for Respondent
JOHN F. MAGNUSON
ISB#04270
PO Box 2350
Coeur d'Alene, ID 83816

Attorney for Appellants
MICHAEL J. HINES
ISB#6876
717 W. Sprague Ave.
Spokane, WA 99201

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 11 day of Feb., 2010

DANIEL J. ENGLISH
Clerk of District Court

By: Shan Reed
Deputy Clerk

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY
CLERK OF COURT
STATE OF IDAHO

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho limited partnership, Plaintiff/Respondent, vs. BLUE DOG RV, INC., an Idaho corporation; THE PATTERSON FAMILY 2000 TRUST CREATED U/T/A/ DATED FEBRUARY 25, 2000; GAYLEN C. PATTERSON, TRUSTEE; THE BRANAGH FAMILY 2000 TRUST CREATED U/T/A DATED JANUARY 13, 2000; JOHN A. BRANAGH, TRUSTEE; KL PROPERTIES, INC., a California corporation; RICHARD A. CORDES and SUZANNE M. CORDES, husband and wife; DAVID BARNES and MICHELLE BARNES, husband and wife; GARY L. PATTERSON and ELIZABETH PATTERSON, husband and wife; PHILLIP J. DION and KIMBERLY L. DION, husband and wife; and ANDREW J. BRANAGH and ANNE C. BRANAGH, husband and wife, Defendants/Appellants.	CASE NO. CV 08-6752 SUPREME COURT DOCKET NO. 37076-2009 **CLERK'S CERTIFICATE**

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I certify that the Attorneys for the Appellants and Respondents were notified that the Clerk's Record and Reporter's Transcript were complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid, on the ____ day of _____, 2010.

I do further certify that the Clerk's Record and Reporter's Transcript will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 11 day of Feb., 2010.

DANIEL J. ENGLISH
Clerk of District Court

By: _____
Deputy

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY
CLERK OF COURT
STATE OF IDAHO